No. 542

LIBRARY
SUPREME COURT,

No. 15083

OCT 11 1957

United States Court of Appeals

for the Ninth Circuit

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

FILED

MAY 21 1958

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MERVIN MOUNCE,

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	PAGE
Answer	15
Attorneys, Names and Addresses of	1
Certificate of Clerk	176
Findings of Fact and Conclusions of Law	25
Judgment	29
Libel of Information	3
Ex. A—Report of Seizure	8
B—Report of Seizure	10
C—Report of Seizure	12
Motion to Amend Findings, Conclusions and Judgment	32
Motion to Dismiss	14
Notice of Appeal	35
Opinion of the Court	17
Order Denying Motion to Amend Findings, Etc.	34
Statement of Points and Designation of Record, Adoption of	181
Statement of Points Upon Which Appellant Will Rely (U.S.D.C.)	36
Transcript of Proceedings September 27, 1955	38

INDEX PAGE

Witnesses:

Bauman, Arthur W.
—direct 103
—cross 106

Brandt, Fred H.
—direct 108
—cross 109

Brumblay, Robert C.
—direct 123
—cross 128

Hoerner, Mrs. Arrah
—direct 110
—cross 113

Markell, Mrs. Faith
—direct 97
—cross 102

Mounce, Mervin
—direct 42, 130
—cross 55, 80, 132
—redirect 91
—recross 95

Sutherlin, Mrs. James
—direct 116
—cross 120

Transcript of Proceedings December 30, 1955 135

Witnesses:

Barnett, Arlie

—direct 142
—cross 143
—redirect 145

Butler, Clay P.

—direct 168
—cross 169

Close, Ralph M.

—direct 166

Fearon, John

—direct 151
—cross 152

Feuersinger, Michl

—direct 137
—cross 140

Gehrke, Arnold

—direct 157
—cross 158

Halverson, Gyle

—direct 156

Latton, Leland

—direct 145
—cross 147
—redirect 151

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United States District Court for the Eastern District of Washington, Northern Division

No. 1286

UNITED STATES OF AMERICA,

Libelant,

vs.

4,200 Copies INTERNATIONAL JOURNAL, Nos. 5 and 11; 500 Copies AFRODITE, No. 1; 300 Bound Volumes HELIOS, Issues Nos. 1 to 12, 1953; 500 Volumes TIDLOSA, No. 1, January, 1955; 2,000 Copies SUN AND HEALTH, International Edition, No. 26, May, 1955; 1,500 Copies HELIOS, No. 23, May, 1955; 700 Copies MODELSTUDIER, No. 41; 200 Copies PARADIES, No. 52; and 100 Copies LICHT UND SCHONHEIT, Heft 11, Jahrang 5, 1954.

LIBEL OF INFORMATION

To the Honorable Judge of the United States District Court for the Eastern District of Washington:

The United States of America by William B. Bantz, United States Attorney for the Eastern District of Washington; and William M. Tugman, Assistant United States Attorney for said District, show to the Court:

1. This libel is filed by the United States of America and prays for seizure of certain printed

matter and pictures in accordance with the provisions of 19 USCA 1305(a).

2. Mervin Mounce, aka James Lindsey, imported into the United States of America from the Kingdom of Sweden printed matter containing photographs and pictures (hereinafter called publications) which was seized by the United States Customs Service May 3, 1955; a copy of the "Report of Seizure" is attached hereto and incorporated herein as Exhibit "A" as though set forth herein in full.

3. Mervin Mounce, aka James Lindsey, imported into the United States of America from the Kingdom of Denmark printed matter containing photographs and pictures (hereinafter called publications) which was seized by the United States Customs Service May 11, 1955; a copy of [1*] the "Report of Seizure" is attached hereto and incorporated herein as Exhibit "B" as though set forth herein in full.

4. Mervin Mounce, aka James Lindsey, imported into the United States of America from the Kingdom of Sweden printed matter containing photographs and pictures (hereinafter called publications) which was seized by the United States Customs Service May 11, 1955; a copy of the "Report of Seizure" is attached hereto and incorporated herein as Exhibit "C" as though set forth herein in full.

*Page numbering appearing at foot of page of original Certified Transcript of Record.

5. Publications seized by the United States Customs Service as shown in Exhibits "A" "B" and "C" included the following described publications published by the following named publishers, to wit: Publication and Publisher:

International Journal, No. 5—Imbert Publishing Co., Copenhagen-Bagsverd, Denmark.

International Journal, No. 11—Haraldslund Ltd., Copenhagen-Lyngby, Denmark.

Modelstudier, No. 41—O.M. Hansen, Forlaget Studia, Copenhagen, Denmark.

Paradies, No. 52—Paradies-Verlag, Stuttgart, Germany.

Tidlosa, No. 1, January, 1955—Etnoforlaget, Orebro, Sweden.

Helios, No. 23, May 1955—International Publishing House, Aarhus, Denmark.

Helios, Bound Volume, Issues Nos. 1 to 12, 1953—Eiraforlaget, Orebro, Sweden.

Licht Und Schonheit, Heft 11, Jahrgang 5, 1954—Walter Lehning Verlag, Hannover, Germany.

Sun and Health, International Edition, No. 26, May, 1955—Internationalt Bladforlag, Aarhus, Denmark.

Afrodite, No. 1—IBS-Forlag, Copenhagen-Lyngby, Denmark.

6. The publications hereinbefore described are obscene and immoral in that the pictures and photographs contained in said publications will so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other persons' hands. [2]

7. Mervin Mounce, aka James Lindsey, imported said publications for the purpose of shipping them for profit by express, and without restriction on resale to the general public, to newstands throughout the United States.

8. Each of the publications hereinbefore set forth contains pictures of nudes, both male and female, in a variety of poses and the accompanying text in the cases of Paradies, No. 52, Tidlosa, No. 1, Helios, Bound Volumes, Issues No. 1 to 12, and Licht Und Schonheit is completely in a foreign language. In the cases of International Journal, No. 11, Modelstudier, No. 41, Helios, No. 23, Sun and Health, International Edition, No. 26, and Afrodite, No. 1, the accompanying text is partially in a foreign language and partially in English. In the case of International Journal, No. 5, the accompanying text is wholly in English.

9. Said publications are in Spokane, Washington, in the Northern Division of the Eastern District of Washington.

Wherefore, libelant prays for process in due form of law according to the course of this Court in cases

of admiralty jurisdiction issue against the aforesaid publications; that all persons having any interest therein be cited to appear herein and answer the aforesaid premises; that this Court decree the condemnation of the aforesaid publications and grant libelant the costs of this proceeding against the claimant of the aforesaid publications; that the aforesaid publications be disposed of as this Court may direct pursuant to the provisions of Sec. 1305 (a), Title 19 USCA; that this libelant have such other and further relief as the case may require.

Dated this 22 day of July, 1955.

UNITED STATES OF AMERICA,

By /s/ WILLIAM B. BANTZ,
United States Attorney,

/s/ WILLIAM M. TUGMAN,
Assistant United States Attorney. [3]

EXHIBIT A

(Copy)

Report of Seizure

Customs Form 5955
Treasury Department
23.3, 23.11, 23.25, C. M. 1943; 23.17, C. R. 1943
April, 1944

United States Customs Service

District Case No. 3531.

Port No. 020-1.

Declaration or Entry No. 020-0166.

4/26/55.

District No. 30, Port of Spokane, Wash.

(Preparing Office): Deputy Collector's.

(Date of preparation): May 3, 1955.

To the Collector of the Port.

Sir: You are hereby notified that the property described below was seized from (Name of individual), Close & Stewart a/c James Lindsey, ex (Vessel or vehicle), United Truck Lines arriving from (Port or place), Sweden (Seattle IT 1815—4/21/55, at (Place of seizure), United Truck Lines Terminal, on (Date of seizure), May 3. 1955, and has been delivered to the Customs Seizure Room.

Describe property here: 2 cases paper bound books—
617 pounds.

300 vols. Helios.

Foreign value: $405.

Duty: ...

Domestic value: $405.

500 vols. Tidlosa.

Foreign value: $68.

Duty: ...

Domestic value: $68.

printed in languages other than English.

W.S.C. (Initialed.)

State circumstances here:

Collector's letter dated April 29, 1955.

Sections of laws violated: Sec. 305 TA 1930, 19 USC 1305.

Names and designations of officers making physical seizure: William S. Cummings, Dep. Coll.

Arrests: None.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To the Appraiser: You will examine and appraise the above-described seized goods according to Sec. 606, T. A. 1930, and indorse return hereon. If perishable or immediate sale advisable, so state.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To be prepared in quintuple; one copy to be retained by seizing office, two copies for use of the Collector, and one copy each for the Bureau of Customs and Comptroller of Customs. [4]

EXHIBIT B

(Copy.)

Report of Seizure

Customs Form 5955
Treasury Department
23.3, 23.11, 23.25, C. M. 1943; 23.17, C. R. 1943
April, 1944

United States Customs Service

District Case No. 3544.

Port No. 020-3.

Declaration or Entry No. 020-0171.

4/5/55.

District No. 30, Port of Spokane, Washington

(Preparing office): Deputy Collector's.

(Date of preparation): May 11, 1955.

To the Collector of the Port.

Sir: You are hereby notified that the property described below was seized from (Name of individual), James Lindsey, Leecraft Service Co., ex (Vessel or Vehicle), United Truck Lines arriving from (Port or place), Denmark (Seattle IT # 1853—4/29/55), at (Place of seizure), United Truck Lines Terminal, on (Date of seizure), May 11, 1955, and has been delivered to the Customs Seizure Room.

Describe property here: 1 case paper bound books—880 lbs.

4200 copies "International Journal."
500 copies "Afrodite."

Foreign value: .....
Duty: $858.50.
Domestic value: .....

W.S.C. (Initialed.)

State circumstances here:

Collector's Letter Dated May 9, 1955.

Sections of laws violated: Sec. 305 TA 1930, 19 USC 1305.

Names and designations of officers making physical seizure: William S. Cummings, Dep. Coll.

Arrests: None.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To the Appraiser: You will examine and appraise the above-described seized goods according to Sec. 606, T. A. 1930, and indorse return hereon. If perishable or immediate sale advisable, so state.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To be prepared in quintuple; one copy to be retained by seizing office, two copies for use of the Collector, and one copy each for the Bureau of Customs and Comptroller of Customs. [5]

EXHIBIT C

(Copy.)

Report of Seizure

Customs Form 5955
Treasury Department
23.3, 23.11, 23.25, C. M. 1943; 23.17, C. R. 1943
April 1944

United States Customs Service

District Case No. 3545.

Port No. 020-2.

Declaration or Entry No. 020-0170.

5/4/55.

District No. 30, Port of Spokane, Wash.

(Preparing office): Deputy Collector's.

(Date of preparation): May 11, 1955.

To the Collector of the Port.

Sir: You are hereby notified that the property described below was seized from (Name of individual), Mr. Mervin Mounce, ex (Vessel or Vehicle), United Truck Lines arriving from (Port or place), Denmark (Seattle IT Entry # 1852—4/29/55), at (Place of seizure), United Truck Lines Terminal, on (Date of seizure), May 11, 1955, and has been delivered to the Customs Seizure Room.

Describe property here: 1 case paper bound books—880 lbs.

2000 copies "Sun & Health."

1500 copies "Helios."

700 copies "Modelstudier."

200 copies "Paradies."

100 copies "Light & Schonheit."

Foreign value: .....
Duty: .....

Domestic value: $1,240.

W.S.C. (Initialed.)

Collector's letter dated May 9, 1955.

Sections of laws violated: Sec. 305 TA 1930, 19 USC 1305.

Names and designations of officers making physical seizure: William S. Cummings, Dep. Coll.

Arrests: None.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To the Appraiser: You will examine and appraise the above-described seized goods according to Sec. 606, T. A. 1930, and indorse return hereon. If perishable or immediate sale advisable, so state.

/s/ WILLIAM S. CUMMINGS,
Deputy Collector.

To be prepared in quintuple; one copy to be retained by seizing office, two copies for use of the Collector, and one copy each for the Bureau of Customs and Comptroller of Customs. [6]

[Endorsed]: Filed July 22, 1955.

[Title of District Court and Cause.]

MOTION TO DISMISS

Comes Now, Mervin Mounce, the person named in the Libel of Information herein as the consignee of the periodicals above named, by his counsel, C. C. Rowan, and respectfully moves this Court for permission to file this Motion and thereupon to enter an Order dismissing this action and libel because the Libel of Information fails to state a claim against said periodicals or facts upon which any relief can be granted herein.

/s/ C. C. ROWAN,
Attorney for Mervin Mounce, Consignee of the Above-Named Publications.

Receipt of copy acknowledged.

[Endorsed]: Filed August 5, 1955. [7]

[Title of District Court and Cause.]

ANSWER

Mervin Mounce, named herein as Consignee of the periodicals above named, respectfully requests the above-entitled Court for permission to file this Answer, and thereupon answers the Libel of Information herein as follows:

1. Admits this libel is filed by the United States of America and the place of seizure of certain printed matter and pictures as alleged but denies that the same is in accordance with the provisions of 19 USCA 1305(a).

2. Denies that Mervin Mounce imported all of said periodicals but alleges that certain persons in the Kingdom of Sweden imported some of said periodicals to the United States with Mervin Mounce as Consignee thereof and that the same were seized as alleged in Paragraph 2.

3. Denies that Mervin Mounce imported all of said periodicals but alleges that certain parties in the Kingdom of Denmark imported some of said periodicals to the United States with Mervin Mounce as Consignee thereof and that the same were seized as alleged in Paragraph 3.

4. Denies that Mervin Mounce imported all of said periodicals but alleges that certain parties from the Kingdom of Sweden imported some of said periodicals to the United States with Mervin

Mounce as Consignee thereof and that the same were seized as alleged in Paragraph 4.

5. Admits the allegations of Paragraph 5.

6. Denies each and every allegation of Paragraph 6 and in this connection [8] alleges that the same were shipped by the shippers and intended to be received by the Consignee, this answering party, for the primary purpose of promoting the nudist movement in the United States and to place the periodicals with nudists and potential nudists because they sincerely believe that nudism is clean, wholesome, moral, enlightening and the opposite of obscene and tends to promote morality in families and groups practicing the same.

8. Admits that said publications contain pictures of nudes, both male and female, and in this connection alleges that such pictures are explanatory and illustrative of the printed matter accompanying the same and are printed and published solely for such purpose; that one of the publications seized in said shipment by the Customs Officials is the official publication of the nudist groups in Sweden, recognized by their government as such, and is published solely to promote the nudist movement; and is encouraged by the American Sunbathing Association whose members believe that all parts of the human body are equal and that none should be treated secretly.

9. Admits the allegations of Paragraph 9.

Wherefore, having fully answered said Libel of Information, this respondent respectfully prays that the Court permit this Answer to be filed and thereupon that said Libel of Information be dismissed and said periodicals released by the Customs Officials to the parties importing the same and their Consignee and for such other relief as the Court deems just and proper.

/s/ C. C. ROWAN,
Attorney for Mervin Mounce, Respondent, Consignee of Above-Named Periodicals.

Duly verified.

Receipt of copy acknowledged.

[Endorsed]: Filed August 19, 1955. [9]

[Title of District Court and Cause.]

OPINION OF THE COURT

WILLIAM B. BANTZ,
United States Attorney;

WILLIAM M. TUGMAN,
Assistant United States Attorney,
Attorneys for Libelant.

C. C. ROWAN,
Attorney at Law,
1020 Paulsen Building,
Spokane, Washington,
Attorney for Claimant. [172]

Driver, District Judge:

This is a libel action brought by the United States against a large number of imported publications. The basic question presented is, whether such publications are obscene and, as such, subject to forfeiture, confiscation and destruction under the provisions of Section 1305 of Title 19, U.S.C.A. That section, in part, provides that all persons are prohibited from importing into the United States "any obscene book, pamphlet, paper, writing * * * print, picture," etc. It authorizes seizure of prohibited publications by the collector of customs and outlines the procedure for their condemnation in the United States District Court. The section further provides that, "No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or prohibited articles contained in the package were enclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * *"

Attached to the libel of information in this case as Exhibits A, B, and C, are three reports of seizure by the United States Custom Service. Exhibit A shows that on May 3, 1955, two cases of paper bound books were seized, consisting of 300 volumes of Helios and 500 volumes of Tidlosa. The report

does not indicate whether the two publications were mixed in the two cases, or all the Helios was in one case and all the Tidlosa in the other. Exhibit B shows seizure on May 11, 1955, of one case of paper bound books containing 4200 copies of International Journal, and 500 copies of Afrodite. Exhibit C shows seizure on May 11, 1955, of one case of paper bound books containing 2000 copies of Sun & Health, 1500 copies of Helios, 700 copies Modelstudier, 200 copies of Paradies, and 100 copies of Licht & [173] Sconheit [sic]. It thus appears that there were 300 volumes of Helios in the seizure Exhibit A, and 1500 copies of the same publication in seizure Exhibit C, but what particular books or periodical issues were in each of the seizures does not clearly appear. Moreover, the "cases" mentioned in the customs reports do not appear to have been kept intact. The United States Marshal's return which is in the file, sets forth a straight listing of the publications taken over by him, with the number of copies of each, without any mention of cases or packages. In this situation it seems impracticable for me to attempt to apply the provision of the statute concerning condemnation of the entire contents of a package if it is found to contain one or more obscene items. I shall, therefore, separately pass upon each publication involved as plaintiff's (libelant's)[1] Exhibits 1-27, inclusive.

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[1]For convenience in the trial, the libelant was called the plaintiff and the claimant the defendant. The same designations will be applied in this opinion.

Plaintiff contends that the publications are obscene by reason of the photographs of nude men and women with which they are illustrated. The word "obscene" is not capable of exact definition for the reason that its meaning depends upon prevailing mores at different times and in different places.[2] However, in what may be termed the modern cases, the courts are fairly well agreed upon the general principles which should govern in the application of the statute under consideration and comparable enactments which forbid transmission through the United States mails of obscene publications.[3]

Nudity is not per se obscene. It may properly be employed in works of art and medical and scientific treatises. A publication is not to be judged by one or two isolated illustrations or passages but is to be regarded as a whole. An effort [174] should be made to ascertain and evaluate the dominant effect, and such dominant effect or tone determines its entire character. The effect upon children or upon persons of extraordinary susceptibility to evil

[2]See United States v. Kennerley, 209 Fed. 119. Judge Learned Hand, the author of the opinion therein, put the following query: "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?"

[3]See for example, United States v. One Book Entitled Ulysses, 72 F.2d 705; Parmelee v. United States, 113 F.2d 729; Burstein v. United States, 178 F.2d 665; and Sunshine Book Company v. Summerfield, 128 F.Supp. 564.

influences is not decisive. The standard to be applied is the judgment of the average, normal, reasonable, prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute. Otherwise it is not. Guided by these general principles, and without having available any definite yardstick that can be applied, the trier of facts must draw the line as best he can between art and pornography—between what is permissible and what is objectionable and obscene.

The difficulty in the present case, I think, arises principally from a difference of viewpoint. The libeled books, with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement. Adherents of the cult conscientiously do not regard as objectionable the full display in mixed company of nude male and female bodies. But nudism is a deviation from the norm at the present time in the United States. Its practitioners are very much in the minority and cannot be said to represent the common viewpoint in this country. The average American, except for works of art or illustrations in medical journals and the like, regards stark nudity, with brazen display of the adult male and female genitalia, as indecent and shocking. This difference of viewpoint was brought out by the testimony of the witnesses in the trial. The defendant called two women, obviously quite respectable—one a mother and the other a grandmother, both members of a

nudist organization—who testified that they saw nothing objectionable in the publications in evidence. On the other hand, two other respectable housewives, who appeared to be representative of the average person of the community, examined th same [175] publications and found them to be indecent and obscene.

It is my conclusion that, with some exceptions to which I shall call attention later on, the publications in evidence have the dominant effect and purpose of showing not only without restraint, but with emphasis on normally private areas, the nude figures of both men and women and that, to the average adult person they are obscene within the meaning of the statute. In reaching that conclusion I have taken many factors into consideration. The character of the printed text in the publications is uniformly unobjectionable, although much of it is in a foreign language and therefore not intelligible to most persons in this country. I have taken into account the relationship of the pictures to the printed articles, the size of the nude figures in the pictures, the relative number of full front and side or back views, and the extent to which the genitals and pubic areas have been covered or minimized by position, posture, distance from the camera, use of light and shade, et cetera.

The libeled books were imported for commercial purposes and were to be sold at a profit through the usual channels of distribution, principally on news stands throughout the country. They were not, therefore, to be limited to members of the nudist cults, and must be judged by their effect upon the

general public. In this connection, it is interesting to note that of the twenty-seven publications introduced in evidence as exhibits for the plaintiff, twenty have on the front cover prominently displayed nude pictures of well-developed, shapely young women. One would be naive, indeed, not to appreciate the commercial value of displaying such front-cover material on the news stands. Although an avowed purpose of the books is to explain the nudist movement, its principles and its practices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in a nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.

The issues of Modelstudier which are in evidence, I think, are clearly within the prohibition of the statute. [176] The publication does not even appear to have any connection with the nudist movement. As the name implies, ostensibly it supplies models for the use of art students.[4] Some of the numbers contain no printed matter at all, and in others the text is wholly, or in large part, in a foreign language. They contain many large closeup, full front-view photographs of nude men and women, plainly showing the genital and pubic areas.

Without going into further detail, I find all of

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[4]The following statement appears in plaintiff's Exhibit 15, Modelstudier NR41: "This publication is primarily planned for artists and draughtsmen who desire to better their model drawing."

the publications, plaintiff's Exhibits 1-27, inclusive, obscene and subject to condemnation and destruction, with the following exceptions: Plaintiff's Exhibit 2, De Neue Zeit, is not mentioned at all in the report of seizure of the customs service, but the Marshal's return lists one hundred copies. It cannot be condemned without a record showing that it was a part of the seizure made by the customs service under the statute. I am of the view that, plaintiff's Exhibit 3, Paradies, and plaintiff's Exhibit 4, Paradies, and plaintiff's Exhibit 16, Afrodite, are not obscene. In these publications some of the figures are clothed, and there is a much larger proportion of side and rear views. There are some shadow silhouettes, and for the most part, the critical areas are concealed, shaded, or minimized by posture or lighting. Also, even to one who claims no expert knowledge in the field, there appears to be a good-faith striving for artistic values in the posing and treatment of the subjects in some of the photographs. While they contain a few illustrations which I should regard as objectionable if considered by themselves, I cannot say that, taken as a whole the dominant effect or tone of the publications is obscene within the meaning of the statute.

Findings in accordance with the views herein expressed may be presented.

/s/ SAM M. DRIVER,
United States District Judge.

Affidavit of mail attached.

[Endorsed]: Filed October 5, 1955. [177]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having been tried by the Court without jury, the Court hereby makes the following findings of fact and conclusions of law:

Findings of Fact

1. Mervin Mounce, aka James Lindsay, imported into the United States of America from the Kingdom of Denmark and the Kingdom of Sweden, the following publications, and one copy of each was introduced into evidence as plaintiff's Exhibits 1 through 27, to wit:

Exhibit No. 1—International Journal, No. 6.
Exhibit No. 2—De Neue Zeit.
Exhibit No. 3—Paradies, No. 41.
Exhibit No. 4—Paradies, No. 40.
Exhibit No. 5—International Journal, No. 11.
Exhibit No. 6—Modelstudier, No. 11.
Exhibit No. 7—International Journal, No. 14.
Exhibit No. 8—Modelstudier, No. 15.
Exhibit No. 9—International Journal, No. 7.
Exhibit No. 10—International Journal, No. 12.
Exhibit No. 11—International Journal, No. 5.
Exhibit No. 12—Modelstudier, No. 3.
Exhibit No. 13—Modelstudier, No. 12.
Exhibit No. 14—Paradies, No. 52.
Exhibit No. 15—Modelstudier, No. 41.
Exhibit No. 16—Afrodite.

Exhibit No. 17—Paradies, No. 53.
Exhibit No. 18—Sun and Health, No. 26.
Exhibit No. 19—Helios, No. 23.
Exhibit No. 20—Tidlosa, January, 1955.
Exhibit No. 21—Paradies, No. 42.
Exhibit No. 22—Tidlosa, December, 1954.
Exhibit No. 23—Licht Und Schonheit.
Exhibit No. 24—Modelstudier, No. 8.
Exhibit No. 25—Modelstudier, No. 13.
Exhibit No. 26—International Journal, No. 13.
Exhibit No. 27—Helios (bound volume, 1953).

2. On May 3, 1955, publications imported from the Kingdom of Sweden were seized by the United States Customs Service, on May 11, 1955, publications imported from the Kingdom of Denmark were seized by the United States Customs Service, and on May 11, 1955, publications imported from the Kingdom of Sweden were seized by the United States Customs Service, copies of the reports of seizure are part of the record herein and are by this reference incorporated herein as though set forth in full, and all the publications described in Finding 1 were included in the packages seized by the United States Custom Service on May 3 and May 11, 1955, and are covered by the reports of seizure thereof.

3. All the publications seized are in Spokane, Washington, in the Northern Division of the Eastern District of Washington.

4. Plaintiff's Exhibits 1 through 27, inclusive, with the exception of Libelant's Exhibit 2, De Neue

Zeit, Libelant's Exhibit 3, Paradies, Libelant's Exhibit 4, Paradies, and Libelant's Exhibit 16, Afrodite are obscene and immoral in that the pictures and photographs contained in said publications would so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other person's hands.

5. The publications described in Finding 1 were imported for commercial purposes and were to be sold at a profit through the [183] usual channels of distribution, principally through news stands throughout the country and their distribution was not limited to members of the nudist cult.

6. The great preponderance of the illustrations in all the publications contain nude pictures of well-developed, shapely young women, mostly in front exposures.

7. There are relatively few photographs in any of the publications which show photographs of mixed groups of all ages which ordinarily would be found in a nudist park.

8. Though the character of the printed text in the publications is uniformly unobjectionable, a substantial portion of the texts is in foreign language and therefore not intelligible to most persons in this country.

9. Taking into account the printed matter in the publications in relationship to pictures and printed articles, the size of the nude figures in the pictures,

the relative number of full front and side or back views and the extent to which the genitals and pubic areas have been covered or minimized by position, posture, distance from the camera, use of light and shade, et cetera, I find that the publications described in Finding 1 have the dominate effect and purpose of showing without restraint and with emphasis on normally private areas, the nude figures of both men and women and that such pictures are obscene to the average adult person.

Conclusion of Law

1. Plaintiff's Exhibits 1 through 27, with the exception of Exhibits 2, 3, 4, and 16 hereinbefore described are obscene and immoral within the meaning of Sec. 1305(a) of Title 19 of the United States Code. [184]

2. The publications described in Paragraph 1 of the findings should be condemned as provided by law.

Dated December 30th, 1955.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed December 30, 1955. [185]

United States District Court for the Eastern District of Washington, Northern Division
No. 1286

UNITED STATES OF AMERICA,

Libelant,

vs.

100 Copies INTERNATIONAL JOURNAL, No. 6; 100 Copies DE NEUE ZEIT; 5 Copies PARADIES, No. 41; 5 Copies PARADIES, No. 40; 297 Copies INTERNATIONAL JOURNAL, No. 11; 300 Copies MODELSTUDIER, No. 11; 300 Copies INTERNATIONAL JOURNAL, No. 14; 300 Copies MODELSTUDIER, No. 15; 300 Copies INTERNATIONAL JOURNAL, No. 7; 300 Copies INTERNATIONAL JOURNAL, No. 12; 273 Copies INTERNATIONAL JOURNAL, No. 5; 250 Copies MODELSTUDIER, No. 3; 250 Copies MODELSTUDIER, No. 12; 197 Copies PARADIES, No. 52; 696 Copies MODELSTUDIER, No. 41; 499 Copies AFRODITE; 99 Copies PARADIES, No. 53; 2000 Copies SUN AND HEALTH, No. 26; 1499 Copies HELIOS, No. 23; 493 Copies of TIDLOSA, January, 1955; 5 Copies PARADIES, No. 42; 100 Copies TIDLOSA, December, 1954; 99 Copies LICHT UND SCHONHEIT; 250 Copies MODELSTUDIER, No. 8; 300 Copies MODELSTUDIER, No. 13; 250 Copies INTERNATIONAL JOURNAL, No. 13; 299 Copies HELIOS (Bound Volume, 1953).

JUDGMENT

This matter having come on before the above-entitled Court without a jury on the 27th day of September, 1955, and the Court having heard the evidence and the arguments of counsel, it is hereby

Ordered, Adjudged and Decreed that Plaintiff's Exhibits 1 through 27 with the exception of Plaintiff's Exhibits 2, 3, 4 and 16 and described as follows are hereby declared to be obscene and immoral:

Exhibit No. 1—International Journal, No. 6.
Exhibit No. 2—De Neue Zeit.
Exhibit No. 3—Paradies, No. 41.
Exhibit No. 4—Paradies, No. 40.
Exhibit No. 5—International Journal, No. 11.
Exhibit No. 6—Modelstudier, No. 11.
Exhibit No. 7—International Journal, No. 14.
Exhibit No. 8—Modelstudier, No. 15.
Exhibit No. 9—International Journal, No. 7.
Exhibit No. 10—International Journal, No. 12.
Exhibit No. 11—International Journal, No. 5.
Exhibit No. 12—Modelstudier, No. 3.
Exhibit No. 13—Modelstudier, No. 12.
Exhibit No. 14—Paradies, No. 52.
Exhibit No. 15—Modelstudier, No. 41.
Exhibit No. 16—Afrodite.
Exhibit No. 17—Paradies, No. 53.
Exhibit No. 18—Sun and Health, No. 26.
Exhibit No. 19—Helios, No. 23.
Exhibit No. 20—Tidlosa, January, 1955.
Exhibit No. 21—Paradies, No. 42.

Exhibit No. 22—Tidlosa, December, 1954.
Exhibit No. 23—Licht Und Schonheit.
Exhibit No. 24—Modelstudier, No. 8.
Exhibit No. 25—Modelstudier, No. 13.
Exhibit No. 26—International Journal, No. 13.
Exhibit No. 27—Helios (Bound Volume, 1953).

it is further

Ordered, Adjudged and Decreed that the above-described publications are condemned, it is further

Ordered, Adjudged and Decreed that the United States Marshal is directed to destroy the publications hereinbefore described on the 6th day of March, 1956, unless otherwise ordered by the Court, and it is further

Ordered, Adjudged and Decreed that plaintiff shall have its disbursements herein.

Dated December 30, 1955.

/s/ SAM M. DRIVER,
United States District Judge.

Presented by:

/s/ WILLIAM M. TUGMAN,
Assistant U. S. Attorney.

[Endorsed]: Filed December 30, 1955. [187]

[Title of District Court and Cause.]

MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT

Mervin Mounce, through his attorney, C. C. Rowan, respectfully moves the above-entitled Court to amend the Findings and Conclusions entered herein December 30, 1955, and hereby proposes the following amendments, to wit:

1. That Finding No. 5 be amended to read as follows: "A portion of the publications described in Finding 1, were imported for distribution among the membership of the members of the American Sun Bathing Association and a portion thereof were imported to be sold through news stands at various points in the country and orders were issued to all dealers not to sell them to any one but members or potential members of the American Sun Bathing Association, a nudist organization."

2. That an additional paragraph be added to said Findings, reading as follows: "That the printed material of none of the magazines contains any statement, word or sentence that is unclean, dirty, filthy or obscene in any manner but is printed to develop the nudist movement and contains the nudists' beliefs and teachings."

3. That another paragraph be added to said Findings as follows: "That the pictures in said magazines are used to illustrate the printed material therein and the teachings of the nudist people."

4. That another paragraph be added to said Findings as follows: "That the pictures in said magazines, if used by themselves and not as illustrations of the printed matter might be obscene, but that all of such pictures are used only for illustrations and because thereof the periodicals themselves are not obscene."

5. That Paragraph 9 of said Findings be deleted or inserted as a [188] Conclusion of Law for the reason that it is such.

6. That the word "not" be added between the words "are" and "obscene" in the first Conclusion of Law.

7. That the word "not" be inserted between the words "should" and "be" in paragraph two of the Conclusions.

8. That the judgment be amended in accordance with such Findings and Conclusions as amended and in particular:

(a) That the word "not" be inserted between the word "declared" and the word "to" in the first paragraph of the decree.

(b) That the word "not" be inserted between the words "are" and "condemned" in line 11, page 2 of said judgment.

(c) That the words "return to the consignee" be inserted in lieu of the word "destroy" in line 13, page 2 of said judgment.

(d) That all of the last paragraph of said judgment and decree be deleted.

This motion is made and will be based upon the entire record, judgment roll, exhibits and all evidence introduced at the hearing hereof and the law in such case made and provided.

Dated this 7th day of January, 1956.

/s/ C. C. ROWAN,
Attorney for Mervin Mounce.

Service of copy acknowledged.

[Endorsed]: Filed January 9, 1956. [189]

[Title of District Court and Cause.]

ORDER DENYING MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT

Mervin Mounce, a claimant to the libeled publications in the above-entitled cause has submitted to, and filed his motion to amend the findings, conclusions and judgment in the above-cause. The claimant's reasons for asking such amendment, and the legal and factual theories on which his motion is based, were fully presented and argued to the Court in the course of the trial, and the Court feels that he is thoroughly acquainted therewith. The Court therefore considers it reasonable and proper that the motion be acted upon and denied without notice of hearing or oral argument, pursuant to the provisions of Rule 78, of the Rules of Civil Procedure for District Courts.

It Is Now Therefore Ordered that the motion of claimant, Mervin Mounce, to amend the findings, conclusions and judgment in the above-entitled cause, is denied.

Done this 19th day of January, 1956.

/s/ SAM M. DRIVER,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed January 19, 1956. [190]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Stanley Taylor, Clerk and to the Above-Entitled Court and to Plaintiff and its Attorney, Honorable William B. Bantz:

You and each of you are hereby notified that the above-named defendants, by Mervin Mounce, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit of the United States of America, from the Findings of Fact, Conclusions of Law and Judgment, made and entered herein December 30, 1955, and all intervening orders herein and from the Order Denying Defendants' Motion to Amend Findings, Conclusions and Judgment entered herein January 19, 1956, and from each and every and the whole thereof.

Dated this 17th day of February, 1956.

MERVIN MOUNCE FOR THE ABOVE PUBLICATIONS,

By /s/ C. C. ROWAN.

[Endorsed]: Filed February 17, 1956. [191]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT WILL RELY

To: The Above-Entitled Court and to Stanley Taylor, Clerk Thereof; and to the United States of America and Its Attorney, Honorable Wm. B. Bantz:

You and Each of You Are Hereby Notified that appellants by Mervin Mounce intend to rely on the following points in their appeal of the above-entitled action to the Ninth Circuit Court of Appeals:

I.

There is no substantial evidence to support the Findings and Judgment.

II.

The judgment is in conflict with the evidence.

III.

The Court erred in finding that photographs, illustrating clean printed material, make the periodicals obscene.

IV.

Congress intended the Act to apply only to those

"restraints needed for [194] the safety of the nation" (not needed here).

V.

If Congress intended otherwise, the Act is unconstitutional because:

(a) No authority is delegated to Congress to regulate morals or the amount of clothing to be used in photographs, used for illustrations in periodicals.

(b) The Act is prohibited by Amendment I of the Constitution in abridging freedom of speech as to honest beliefs regarding nudism.

(c) The Act invades rights reserved to the States, namely, to regulate the morals of these people and is contrary to the Ninth and Tenth Amendments.

(d) The Act is not sufficiently certain to permit uniform construction and enforcement.

(e) The Act deprives appellant of his liberty and property without due or uniform process, contrary to the Fifth Amendment.

VI.

As construed by the trial Court, the Act is discriminatory between beliefs and teachings as to health and morals.

Dated this 17th day of February, 1956.

/s/ C. C. ROWAN,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed February 17, 1956. [195]

United States District Court, for the Eastern District of Washington, Northern Division

No. 1286

UNITED STATES OF AMERICA,

Libelant,

vs.

4200 Copies INTERNATIONAL JOURNAL, etc.,

Claimant.

BILL OF EXCEPTIONS

Be It Remembered that heretofore, on to wit, the 27th day of September, A.D., 1955, at the hour of 9:30 o'clock a.m., the same being one of the judicial days of the September A.D., 1955, term of said Court, this case came on for trial before the Honorable Samuel M. Driver, the Judge of said Court, whereupon the following testimony was taken and proceedings had in due form of law.

Present:

WILLIAM B. BANTZ,
United States Attorney,
WILLIAM M. TUGMAN,
Assistant U. S. Attorney,
Attorneys for Libelant.

C. C. ROWAN,
Attorney for Claimant. [11]

The Court: May I say at this time that Mr. Ernest E. Getchell will be acting as Court reporter. I appoint him as official temporary reporter as soon as this case is set for trial.

The United States against 4200 copies of International Journal, etc.

Mr. Rowan: May it please the Court, a witness that I must have is cooking for the Chamber of Commerce. She was here yesterday and lost a half of a day, and she told me not to subpoena her until three o'clock this afternoon or she would lose her job, and counsel is agreeable that the Court issue the subpoena for three o'clock instead of nine-thirty this morning. Is that agreeable, Your Honor?

The Court: Yes. You may call her out of order, if necessary.

Mr. Bantz: Your Honor, before we get started on this matter, counsel for Mr. Mounce, and myself representing the United States, have agreed to a stipulation. Do you desire that we read it or just file the stipulation?

The Court: Is it very long?

Mr. Bantz: It is just one page, Your Honor.

The Court: Maybe you had better read it.

Mr. Bantz: Your Honor, the parties in this case are referred to as libelant and claimant, but they will be referred to later as plaintiff and defendant. [14]

(The stipulation referred to was read into the record and is in words and figures as follows:)

"It is hereby stipulated between counsel for the libelant and the claimant that in the above-entitled cause:

"1. The Court has jurisdiction in said matter in view of Section 1305a, Title 19, U.S.C.A.; subject to all constitutional objections, which are preserved.

"2. All of the proper procedures were followed by the United States Customs Service, to wit:

"(a) publications were seized on May 11, 1955, in accordance with Section 1305a, Title 19, U.S.C.A.;

"(b) the claimant asked for dismissal of the libel, which was refused by the Collector of Customs in accordance with the statute;

"(c) the claimant has answered the libel and it is now at issue;

"3. The libelant and claimant have waived their right to jury in this matter;

"4. The libelant may enter its Exhibits 1 through 27 as evidence to be used in this case and as part of the matter libeled under this action;

"5. The issue before the Court is whether or not the publications libeled by the United States Attorney are obscene and in violation of the statute, Section 1305a, Title 19, U.S.C.A.

"Dated this 27th day of September, 1955." [15]

It is signed by me as United States Attorney and William Tugman as Assistant United States Attorney, and Mr. C. C. Rowan, Attorney for Claimant.

Mr. Bantz: Your Honor, before we start with this, this case is one of those cases where I think that the defense actually starts out first with their

evidence. Do you want us to do that here, or do you desire us to just proceed and maybe end up——

The Court: I will just leave that to your discretion as to whether you think it would be helpful or not. I don't feel that I need it, and unless you have something that you didn't call my attention to, you can either make a statement or not, just as you wish. I assume that the whole question here is whether the publications and pictures set out in them are considered obscene within the meaning of the statute; so that that is about the issue, whether they are or not. Isn't that it?

Mr. Bantz: I would rather reserve the right to make a statement later.

The Court: Oh, yes. Of course, you have a right to argument.

Mr. Bantz: That is what I mean.

The Court: Do you have any statement, Mr. Rowan?

Mr. Rowan: I don't think so. I think all the statement that I have to bring out will be brought out from the witness stand.

Mr. Bantz: Does Your Honor wish the Government to make a proof first, or do you wish the respondent to make its proof first? [16]

The Court: I think that is what they usually do, is to follow the burden of proof, unless there is some reason for some other order.

Mr. Bantz: Well, Your Honor, both of us feel that perhaps under the statute it appears, as I read it, that if we feel that anything is obscene——

(Discussion off the record.)

The Clerk: Your Honor, in that stipulation it provides for these exhibits to be admitted.

Mr. Bantz: If Your Honor please, I move that Exhibits 1 through 27 be admitted in evidence.

The Court: Libelant's or Plaintiff's Exhibits 1 through 27 will be admitted.

(The items referred to were received in evidence as Plaintiff's Exhibits 1 through 27.)

Mr. Rowan: I will call Mr. Mounce.

MERVIN MOUNCE

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Rowan:

Q. Your name is what?
A. Mervin Mounce.
Q. And you reside here in Spokane? [17]
A. Right.
Q. Where do you live, Mr. Mounce?
A. 1658 East Broad.
Q. How long have you lived there?
A. At this particular address?
Q. No, in Spokane.
A. I was born here. I have been here all my life.
Q. What is your occupation, Mr. Mounce?
A. Publisher. I also do some contracting work.
Q. Are you married and have a family?
A. Yes.

(Testimony of Mervin Mounce.)

Q. You are the respondent named in these proceedings, are you not?

A. I don't know whether I am or not.

Q. All right. Strike that. Are you a member of the American Sun Bathing Association?

A. Yes.

Q. Explain to the Court what that association is.

Mr. Bantz: Your Honor, I will object to his going into here about the Sun Bathing Association. I don't see any connection.

Mr. Rowan: I am just trying to get it——

The Court: I presume it is preliminary. I will overrule the objection.

Mr. Bantz: All right. [18]

A. The American Sun Bathing Association is a national association of nudists in this country.

Q. Do you know how many members approximately there are?

A. As near as I can tell, around 10,000.

Q. Were you the national president of that organization a year ago—a little over a year ago?

A. I am the immediate past President.

Q. Do you have a local of that association, the Nudist Association here in Spokane, Washington?

A. Yes, we do.

Q. Were you incorporated here in the State of Washington? A. That's right.

Q. Some time ago under what name?

A. Sunway Society.

Q. And that society is a nudist group?

A. That's right.

(Testimony of Mervin Mounce.)

Q. Do you believe in nudism?

A. Yes, sir.

Q. And the society does? A. Yes, sir.

Q. Do you have a summer camp?

A. Yes, sir.

Q. Where is that camp?

Mr. Bantz: I will object to this whole line of questioning. [19]

The Court: It will be understood that your objection will go to the whole line of questioning without repeating your objection each time.

Mr. Bantz: Thank you, Your Honor.

Mr. Rowan: Will you read the question, Mr. Reporter?

(The question was read by the reporter.)

A. It is about about forty miles north of Spokane near Deer Lake.

Q. Do your people go to that camp each summer? A. Yes.

Q. Do you practice nudism?

A. That's right.

Q. Do men and women and children all go into that camp entirely unclothed? A. Yes.

Q. Now, will you tell us whether there is anything obscene about nudism?

A. Nothing that I know of.

Q. Why is it that you believe that nudism is wholesome? The point is, will you explain what is meant by that?

A. Why nudism is wholesome?

(Testimony of Mervin Mounce.)

Mr. Bantz: Your Honor, I will object to this as being—He is testifying as an expert on this matter. I want to keep the record straight as to his connection in this case. I want to know which way he is——

The Court: Do I understand that he is the owner of these [20] publications?

Mr. Rowan: No, not the owner, no. He imports them. He is the owner; that's right. That's right. If he is not, that destroys our whole defense, and it is for the sole purpose of protecting nudism in this country that is so necessary. That has not been denied. Now, certainly, we will have to show what nudism is if Your Honor is to finally determine whether these magazines are obscene.

The Court: Yes, I know that. The record may show that you object to this whole line of testimony.

Q. (By Mr. Rowan): Do you understand the question, Mr. Mounce?

A. I don't remember it.

Mr. Rowan: Will you read the question, Mr. Getchell?

(The question was read by the reporter.)

A. Well, we believe, Mr. Rowan, that the human body is created in the image of God and is a wholesome thing in all its aspects and——

Q. (Interposing): Do the nudist people have a magazine of their own?

A. No. Well, specifically they do. They have an

(Testimony of Mervin Mounce.)

official magazine the same as the Sun Bathing Association.

Q. Are these articles imported from Denmark, Norway, and Germany and other places where they practice nudism? A. That's right.

Q. How long have you been—have nudist people been buying [21] them? A. I can't say.

Q. Do they subscribe for them?

A. Yes, quite often.

Q. Do you have any actual subscribing individuals for some of them? A. That's right.

Q. And others you put out to distributors, do you not? A. Yes.

Q. Have you ever taken any pains to advise the distributors about the sale of these publications?

Mr. Bantz: I will object to that.

The Court: I don't think it is proper. By the way, where were these magazines when they were received, libeled?

Mr. Bantz: They were in Spokane.

Mr. Rowan: Some in Spokane and some in Seattle.

Mr. Bantz: They were in transfer to Seattle from Denmark.

The Court: Does that come under the Interstate Commerce Commission?

Mr. Bantz: Yes, it was in foreign commerce, Your Honor.

The Court: All right. Go ahead.

Mr. Rowan: Will you read the question, Mr. Reporter?

(Testimony of Mervin Mounce.)

(The question was read by the reporter.)

Q. (By Mr. Rowan): Mr. Mounce, you put these magazines out with [22] various dealers throughout this part of the country, do you not?

A. Yes.

Q. And other nudist groups, individuals put them out in other parts of the country?

A. Yes.

Q. Now, is your membership, or has your membership been growing? A. Very rapidly.

Q. Do you know where your membership comes from; that is, where your converts to nudism come from? Have you made any tests so that you know?

A. Our national office has.

Mr. Bantz: I object to that answer as not an answer to the question. He doesn't know.

The Court: I think it is hearsay. You may ask him if he knows.

A. The distribution grows, from the reading of the magazine——

Q. What percentage of it? A. 71 per cent.

Q. Were you President of the National Association? I believe you said you were for a year.

A. Yes.

Q. And while you were President of the Association, did you ever make any records to determine what the juvenile delinquency percentage was with your group, as compared with the national? [23]

A. We have no record of any juvenile delin-

(Testimony of Mervin Mounce.)

quency in over twenty-five years in nudism in this country.

Q. And you raised your families in that belief; is that correct, your children? A. Oh, yes.

Q. They are taught to understand that every part of the human body is the same as any other part and not to be curious about any portion of it; is that correct? A. That is right.

Q. Are you acquainted with the magazine "Sun," which was attempted to be libeled by the United States Government recently? A. Yes.

Q. Have you put that magazine out along with others? A. No.

Q. You haven't put that out? A. No.

Mr. Rowan: I wonder if I can have these marked.

(Whereupon, the magazines referred to were marked Defendant's Exhibits 28, 29, 30, 32, 32, and 33 for identification.)

Mr. Bantz: Let me ask some questions on voir dire, Mr. Mounce.

Q. (By Mr. Bantz): These magazines are published in the United States? A. Yes, sir. [24]

Q. That is Sunshine and Health? A. Yes.

Q. Defendant's Exhibits for Identification 30 and 31? A. Yes.

Q. And Defendant's Exhibits 28 and 29, were those published in the United States?

A. Yes.

Q. Where are these published?

(Testimony of Mervin Mounce.)

A. I believe in Boston—I believe in Boston.

Q. And Exhibit No. 32; is that published in the United States? A. Yes.

Q. And all of them are published in the English language, are they?

A. Not the Sun Magazine. I believe there are some in foreign languages.

Q. How about Defendant's Exhibit No. 33? Is that published in the United States?

A. That is the same.

Q. Is this the national edition?

A. No. It is published in Denmark.

Q. In Denmark? A. Yes.

Mr. Bantz: Well, Your Honor, I would object.

Mr. Rowan: I haven't offered them yet. [25]

Q. (By Mr. Rowan): Mr. Mounce, calling your attention to Exhibits 28 and 29, what are those?

A. Copies of the Sun Magazine.

Q. Are you familiar with the case of Sommerville versus Sunshine Publishing Company?

Mr. Bantz: Your Honor, I will object to that.

Q. (By Mr. Rowan): Are those two of the identical issues of the magazine which were attempted to be libeled by the Government?

A. I believe so.

Mr. Rowan: Now, if the Court please, I offer them at this time and——

The Court: I think that while——

(Argument and reading and citing of cases.)

(Testimony of Mervin Mounce.)

Mr. Rowan: I am offering them, if Your Honor please, and——

The Court: I think they would be of some assistance to the Court.

(Whereupon, the magazines previously marked Defendant's Exhibits 28 and 29 for identification were received in evidence.)

Q. (By Mr. Rowan): I call your attention to Defendant's Exhibits 30 and 31 and ask you what they are.

A. Copies of Sunshine and Health Magazine. [26]

Q. Are those two the magazines that were attempted to be libeled? A. Oh, yes.

Q. They are the same identical monthly issues?

A. That is correct.

Mr. Rowan: We offer these for the same purpose.

The Court: All right, they will be admitted for that purpose.

(The magazines previously marked Defendant's Exhibits 30 and 31 for Identification were received in evidence.)

Q. (By Mr. Rowan): I call your attention to Defendant's Exhibit No. 32 and ask you what that is?

A. A copy of the American Nudist Leader Magazine.

Q. Where is that published?

(Testimony of Mervin Mounce.)

A. In Spokane.

Q. And who puts it out? A. I do.

Q. You haven't admitted it to be——

Mr. Bantz (Interposing): Your Honor, I will object to that. I think we had better let the witness do the testifying and I will object to that statement.

The Court: I think the question was leading.

Mr. Rowan: I will try not to do that, Your Honor. I think [27] we will offer the magazine for the same purpose only—for the purpose of comparison.

The Court: Are you objecting to it, Mr. Bantz?

Mr. Bantz: Yes, Your Honor.

The Court: I will sustain the objection to that exhibit.

Q. (By Mr. Rowan): I call your attention to Defendant's Exhibit 33 and ask you what that is?

A. A copy of Sun and Health Magazine, published in Denmark.

Q. And that is the same magazine, some of which are involved in this case?

A. It is the same publication, yes.

Q. But not the particular issues? A. No.

Q. Is there not an editorial by the publishing company, or editor of that magazine, which shows the purpose of the magazine, including the pictures?

A. Yes, there is.

Mr. Rowan: If the Court please, I offer these in evidence only for the one purpose of showing the

(Testimony of Mervin Mounce.)

editorial on page 25, which concludes with the statement:

(Reading:)

Mr. Bantz: Your Honor, I can't see now the materiality in this case of what some editor has put in a magazine.

The Court: I think I will sustain the objection to it, [28] but maybe some proof may be made by having the witness testify. I think it is at least unofficially the purpose of all of these pictures, the nude pictures, is for the purpose of advancing nudism.

The Witness: That is correct.

Mr. Rowan: All right.

Q. (By Mr. Rowan): Mr. Mounce, have you gone over all the magazines that are put out by the companies—the various issues, not the ones libeled here, but preceding issues of the same publications?

A. Oh, yes.

Q. Are they generally, these that are being libeled, about the same as the preceding issues?

A. I would say so.

Q. And have you ever found one word of dirt or filth or obscenity in any of the written portion of any of those magazines?

A. I have never found anything obscene in any of them.

Mr. Bantz: Your Honor, may I clear up what magazines are being talked about?

The Court: I am not sure whether he is talking

(Testimony of Mervin Mounce.)

about these last two exhibits or Exhibits 1 to 27.

Mr. Rowan: I am confining it to 1 to 27.

The Court: And he is talking about what magazines?

Mr. Rowan: He said that these exhibits are the same in general content as the previous publications of the same [29] magazines.

The Court: Yes.

Mr. Rowan: Then, I will ask if he has ever found in any publication of these magazines—if he has ever found in any of them any dirt or smut or obscene language in the printing.

The Court: If he refers to the ones that are in evidence, but he is covering the whole range, before or after.

Mr. Rowan: That is correct.

Q. (By Mr. Rowan): Is there any picture in any of the magazines that are attempted to be libeled here, or in any of the preceding issues in which the picture itself is set out for any purpose other than to illustrate the written content of that magazine? A. No, I don't think so.

Q. Now, Mr. Mounce, you ship some of these magazines under the name of James Lindsay, do you not? A. Yes.

Q. You use that name, do you? A. Sir?

Q. I say you use that name, do you?

A. Yes, sir.

Q. You have an DBA on file in the county court house? A. Yes, it is registered.

Mr. Rowan: Unless there is a limitation to this,

(Testimony of Mervin Mounce.)

I [30] would like to ask for the witness to explain to the Court why he uses that name.

Q. Do you use the name as well as your own?

A. Well, there is a little professional jealousy between some of these dealers in foreign countries. For instance, the publisher of Sun and Health Magazine has said, "If you handle any other magazines from other publishers," that he will refuse to sell you Sun and Health Magazine.

Q. You have, however, other names on file, have you? A. That's right.

Mr. Rowan: We will dictate this into the record instead of offering it:

(Reading:) "It is agreed between the Government, the plaintiff, and the defendant in this case that if the publishers of the magazines in question, and the nudist people of this or foreign countries were called to testify in this case, they would testify that none of these publications are put out for any purpose whatever than to promote nudism; that men and women who are non-nudists would testify to the same thing and——".

Mr. Bantz (Interposing): No, no man other than a nudist would testify that they were decent.

Mr. Rowan: No. Here is the statement right here (referring to paper).

Mr. Bantz: I cannot stipulate as to what somebody is [31] going to say that is not a nudist are not obscene. I think we were assuming that it is if they were nudists.

(Discussion off the record.)

(Testimony of Mervin Mounce.)

Q. (By Mr. Rowan): Mr. Mounce have you received a number of letters from the—sworn statements from publishers, ministers, nudists, and non-nudists, expressing an opinion about these—answer that yes or no—expressing an opinion about these magazines? A. Yes, I have.

Q. And you have received contributions from people? A. Yes, I have.

Q. Did I ask you if you have ever taken steps to see that these magazines are put out for the purpose of promoting nudism only?

A. I don't think——

Q. (Interposing): Answer that, please.

A. Yes.

Q. How have you done it?

A. We have written to the different distributors telling them that our interests in selling these magazines was to promote nudism, and advised them to use—In other words, we do not approve of selling them to minors where the parents may object, or to individuals, depending on who they were.

Mr. Rowan: I think you may take the witness. I have one more question later. [32]

Cross-Examination

By Mr. Bantz:

A. Mr. Mounce, you use various means other than your own, isn't that right, to obtain these articles for the magazine?

A. No, not for that purpose, just the name of James Lindsey.

(Testimony of Mervin Mounce.)

Q. Do you use a post office box under somebody else's name to distribute them; is that right?

A. We use the Home Maker's Supply for that purpose.

Q. Do you use other names for that purpose?

A. Well, we separate our mail. When it comes in we sort out of town mail and put it in different piles.

Q. Do you consider it a commercial enterprise? It is a commercial enterprise, isn't it?

A. No, it is not a very appropriate one.

Q. You say that it is not a commercial enterprise? A. Not the magazines.

Q. How many post office boxes do you sell these under? A. We have only two.

Q. Have you ever had more than two?

A. Oh, I don't believe so.

Q. They come to you under a post office box number? You advertise as a blind number, isn't that right?

A. Well, the reason we do that is because we get our mail there at eight o'clock in the morning at the post office; whereas, we get it at the street address we get it at four o'clock in the [33] afternoon.

The Court: Just a minute. Are these magazines sold by advertising to certain post office boxes and they are mailed out?

Mr. Bantz: He just made a statement that it was a non-commercial enterprise.

The Court: All right. I do not have any clear pic-

(Testimony of Mervin Mounce.)

ture in mind as to what was done about these magazines.

Mr. Rowan: I don't remember whether they were libeled under the trade name or James Lindsey.

Mr. Bantz: I think it is perfectly material.

Q. (By Mr. Bantz): How many magazines are libeled, or do you have any knowledge?

A. How many different——

Q. No, how many individual copies?

A. I believe they are stated on there (referring to paper in counsel's hand).

Q. It is some 4,000 of them, or more—in excess of 4,000; isn't that right?

A. I have stated that I think there are probably more than that.

Q. But it is in excess of 4,000, anyway, isn't it?

A. I believe so.

Mr. Rowan: We will admit that.

Q. (By Mr. Bantz): Now, let us just use the number 4,000. That [34] is 4,000 magazines going to be sold by you; is that right?

A. Of course——

Q. Not only to nudists, but to other people; is that correct? A. That is correct.

Q. Now, you have agencies all over the United States that you ship these to? A. Yes.

Q. Do you have a list of those agencies?

A. Yes.

Q. Where is your list? Do you mind getting that

(Testimony of Mervin Mounce.)

list for me, Mr. Mounce? Do you have other shipments coming in all the time besides these here?

A. Not now.

Q. Don't you have a shipment in Los Angeles right now?

A. Well, it has been down there—when it was determined to seize these shipments.

Q. Do you have any other shipment in the State of Washington?

A. I think there is one in Seattle. It was about that time. It has been lying there for some period of time.

Q. Are there some 3,000 magazines in Los Angeles? A. I don't know.

Q. Have you any recollection? A. No.

Q. How many do you buy a year of all these magazines contained in Exhibits 1 through 33? [35]

A. I can't tell you exactly.

Q. 25,000?

Mr. Rowan: If the Court please, I object to that as wholly immaterial.

Mr. Bantz: Your Honor, they made a statement that they were for nudists.

The Court: I will overrule the objection to the term of "nudists."

Q. (By Mr. Bantz): Do you have 25,000 a year?

A. I would say probably that is right.

Q. Now, you buy it at a certain price, and I don't care what price, but you buy it at a certain figure; isn't that right? A. Yes.

(Testimony of Mervin Mounce.)

Q. And you sell them for a higher figure; isn't that correct? A. Correct.

Q. And the money that is received from them is put in your pocket; isn't that right?

A. No.

Q. What happens to it?

A. It is used to buy more magazines.

Q. You purchase for one dealer association and——

A. (Interposing): We keep the money separate from all other money but, of course——

Q. (Interposing): Isn't your association a non-profit organization? [35A] A. It is.

Q. And you sell the mazagines at a profit?

A. Sometimes at a loss and sometimes at a profit; but very little.

Q. Now, you made a statement about dealers' instructions. Do you recall talking to an agent from the Bureau of Customs about what instructions you gave these dealers?

A. Well, I don't know exactly what was said. He was out there to the office.

Q. Did you tell him that you gave them no instructions? A. I doubt whether I did or not.

Q. How many dealers do you have in the United States? A. I would have to count them.

Q. Do you know approximately how many you have?

A. Oh, gee, I think maybe fifty. I couldn't tell you, because that goes back three years.

(Testimony of Mervin Mounce.)

Q. These dealers that we are talking about here, some of them are in Seattle, Washington?

A. Yes, they are all over the United States.

Q. It makes no difference what part of the city these different dealers have offices; is that right?

A. Well, it does.

Q. Well, do you know what part of the town they are in? A. Some of them. [36]

Q. Are some of them on the skid road?

A. There may be; I don't know.

Q. In other words, you sell them to anybody that will subscribe to them?

A. These are not subscribers.

Q. I mean they will purchase them for cash, or however you do it?

A. Oh, now, I wouldn't say that.

Mr. Bantz: Mr. Clerk, would you give me Plaintiff's Exhibits 6, 8, 12, 13, 15, 24, and 25?

The Court: I think this is a good time for the morning recess. We recess until 11:30.

(A short recess was taken.)

Q. (By Mr. Bantz): Where did you say you live, Mr. Mounce? A. 1658 East Broad.

Q. Is that where you conduct this business?

A. No.

Q. Where do you conduct this business?

A. East 1 Dalton.

Q. You have four or five employees that are engaged in the handling of this stuff; is that right?

A. My wife and I and two others.

(Testimony of Mervin Mounce.)

Q. But you handle all of the distribution of these magazines? A. Yes. 37]

Q. Do you have a large number of them in a warehouse that you have for reserves?

A. No. The room there is about 16x18, I guess; something like that.

Mr. Bantz: Mr. Clerk, will you mark this for identification, please?

(A card index was marked as Plaintiff's Exhibit No. 34 for identification.)

Mr. Rowan: May it be understood that none of these are admitted and that we may use photostatic copies?

Mr. Bantz: Absolutely.

Mr. Rowan: These are the original records.

The Court: Yes. Copies may be made.

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit for identification No. 34. What is that that you have in your hands there?

A. That is the record of shipments.

Q. Those are your personal records; is that correct? A. Yes.

Q. Of people to whom you ship? A. Yes.

Q. And how many magazines and so forth?

A. Yes.

Q. Now, Mr. Mounce, you may state whether the printing or the type or the wording in connection with the pictures—would you [38] explain that? What is nudism? Is that correct?

(Testimony of Mervin Mounce.)

A. That is right with the exception of one particular type.

Q. What is that?

A. That is Model Studier.

The Court: These distributors as shown on Exhibit 34, are they for news dealers?

The Witness: They are.

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit No. 6, would you examine that magazine, please? A. Yes.

Q. Now, is there any writing in that magazine?

A. Yes.

The Court: What one do you have now?

Mr. Bantz: I have Plaintiff's Exhibit No. 6, your Honor.

The Court: Is that the one we were looking at just now?

Mr. Bantz: Yes.

Q. What language is that written in?

A. Well, there is some in English.

Q. Most of it is in what language? Do you have any idea?

A. Well, most of it is—about half English and half in something else.

Q. Do you speak German or Swedish? [39]

A. No.

Q. Do you read it? A. No.

Q. Is there a prerequisite of the nudist movement that they read these languages?

A. Well, many of them do.

(Testimony of Mervin Mounce.)

Q. Isn't it true that the bulk of Plaintiff's Exhibits 1 through 27 are in a foreign language?

A. No, I don't think so.

Q. All right. Taking Plaintiff's Exhibit No. 8, is there any writing in it explaining the pictures?

A. Well, apparently not in this issue.

Q. In other words, Plaintiff's Exhibit 8 is just a picture of a nude woman; isn't that right, or is there any—— A. Any writing?

Q. No writing or explanation of what it is?

A. No.

Q. Now, the nudist movement—there should be some explanation of what it was for; isn't that right?

A. We had originally intended to have an insert in there telling about the nudist movement.

Q. But there isn't any in there; isn't that right?

A. That is true.

Q. All right, and it is true, too, in all of 12, 13, 14 and 25, which are all different issues? [40]

A. I would have to examine each one of them. There is English text in this one here, No. 12.

Mr. Rowan: Which number?

Mr. Bantz: No. 12.

A. (Resumed): There is English text in No. 13.

Q. How much English is there in Exhibit 13?

Mr. Rowan: The exhibit has been introduced.

Mr. Bantz: Just a minute.

Mr. Rowan: I will withdraw the objection.

A. There is one column. There seems to be something here (witness indicating). It is continued from the last magazine.

(Testimony of Mervin Mounce.)

Q. From the last magazine? A. Yes.

Q. Those magazines are—they are the same magazine but different issues? A. Yes.

Q. Now——

Mr. Clerk, will you get me 1, 5, 7, 9, 10, 11 and 26?

(The clerk handing papers to counsel.)

Q. Handing you Plaintiff's Exhibits 1, 5, 7, 9, 10, 11 and 26, will you look at those, please?

A. With reference to the pictures?

Q. No, just look at them. Do you know what they are? A. Well, certainly.

Q. All right. What is the name of that? [41]

A. The International Journal.

The Court: What are the numbers?

Mr. Bantz: 1, 5, 7, 9, 10, 11 and 26.

A. They are printed in three languages. One, the first column, is in English and the other two are translations.

Q. And that is in Plaintiff's Exhibit No. 5; is that right? A. Yes.

Q. And there is just the one column of, or one article, with numerous pictures; isn't that correct?

A. Well, the pictures herein are scattered through the magazine. Now, I don't think there are any more pictures there than we found—than we find in this (witness indicating).

Q. And also Plaintiff's Exhibit No. 7. Plaintiff's Exhibit No. 7 which I now hand you is a picture here on the third page from the back showing

(Testimony of Mervin Mounce.)

a man standing beside a woman. I am assuming now that that picture has no obscenity to it at all; is that correct? A. Right.

Q. In other words, that is another nude picture so far as your movement is concerned?

A. Well, I think so.

Q. Getting back to these exhibits that you have, 1, 5, 7, 9, 10, 11 and 26, most of those are posed pictures, are they?

A. I wouldn't know about that. Apparently——

Q. (Interposing): I mean that is just a picture taken in a [42] nudist camp some place?

A. I believe they are taken in a nudist camp.

Q. Aren't those mainly pictures just posed by a nude—— A. (Interposing): No——

Q. You have no knowledge of it, in other words?

A. Oh, this one here (indicating), is apparently posed.

Q. From Exhibit 10 you are seeing a picture of a family. That is not apparently posed?

A. It does not appear to me to be posed.

Q. All right. How about the next page on Exhibit 10? Does that appear to you as posed pictures? A. Well, most pictures are posed.

Q. Showing the pubic parts? It is a picture that is in all of those International Journals?

A. Apparently, yes.

Mr. Bantz: Now, Mr. Clerk, will you hand me Plaintiff's Exhibit No. 27?

(The clerk handed papers to counsel.)

(Testimony of Mervin Mounce.)

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit 27. Are you familiar with that book?

A. Yes.

Q. What is that?

A. It is called Helios.

Q. All right. Is this a true statement, that that is a complete [43] book of all the 1953 issues?

A. I believe so.

Q. Now, what language is that printed in?

A. Well, I believe it is Danish, but I cannot——

Q. It is all in a foreign language though, isn't that right?

A. There may be some English here, if I look through it.

Q. To your knowledge, Helios is printed in a foreign language, all of it; isn't that correct?

A. They now put out an English language edition.

Q. But none of these are here?

A. Well, there may be—I don't know. We quit handling those since the English language edition was available.

Q. But you just put these out recently, didn't you? A. Oh, gosh——

Q. They are in another issue since February. But it is in a foreign language?

Mr. Rowan: If the Court please, the pamphlet shows itself that it is a 1953 edition.

Mr. Bantz: That is right. I am just asking him to make the statement if I may put it——

(Testimony of Mervin Mounce.)

(Addressing the clerk): Now, Mr. Clerk, may I have exhibits 3, 4, 14, 17, and 21?

(The clerk handing papers to counsel.)

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibits 3, 4, 14, 17 and 21, what [44] are those exhibits—Paradies? What language?

A. It looks like German. It is published in Germany.

Q. They are written in a foreign language; is that right? A. Yes.

Q. Now, in Plaintiff's Exhibit 14, I notice that there is attached an English translation that appears there in the book; is that correct? A. Yes.

Q. You had to write and get that English translation; isn't that right?

A. They could have gotten somebody here in town to translate it.

Q. But you did write for it? A. I did.

Q. And it does not come as a part of the magazine? A. No.

Mr. Bantz: Mr. Clerk, may I have No. 16?

(The clerk handing papers to counsel.)

Q. (By Mr. Bantz): Handing you Plaintiff's Exhibit 16, would you look at that, please? Are you familiar with that magazine?

A. Well, it is a comparatively new one.

Q. Are you familiar with it? A. Yes.

Q. What language is it printed in? [45]

(Testimony of Mervin Mounce.)

A. Part in English and part in a foreign language.

Q. That is one that you are just starting to get now; is that right?

A. This would be the first issue. We have never received any of these.

Mr. Bantz: Mr. Clerk, may I now have Plaintiff's Exhibit No. 23?

(The clerk handing papers to counsel.)

Q. (By Mr. Bantz): Now, Mr. Mounce, are you familiar with this magazine? A. Yes.

Q. What language is it printed in?

A. I don't know.

Q. It is in a foreign language of some kind; isn't that right? There is no English translation in that, is there?

(No answer.)

Q. Is your answer no? A. No.

Mr. Bantz: Now, Mr. Clerk, may I have Exhibits 20 and 22?

(The clerk handing papers to counsel.)

Q. (By Mr. Bantz): Will you examine these and tell me if you know what magazines they are?

A. They are the Tidlosa, published—that is the official [46] journal of the nudist movement in Sweden.

Q. What language? A. Swedish.

Q. Now, I notice that Plaintiff's Exhibit No. 20—You have received an English translation of

it; is that correct? A. Yes.

Q. You had to send and get a translation; is that correct? A. That is right.

Q. It does not come with the magazine?

A. No.

Mr. Rowan: I may state that I did not offer them for the purpose, Mr. Bantz, to mislead the Court or counsel to think that they were a part of the magazines. It was only for interpretation.

The Court: It is convenient.

Q. (By Mr. Bantz): Will you tell us if you recognize that magazine?

A. Yes, sir. They have to do with the movement——

Q. They are in a foreign language? A. Yes.

Q. And it is the same as in Plaintiff's No. 2?

A. Yes.

Mr. Bantz: Now, Mr. Clerk, may I have No. 18?

(The clerk handing papers to counsel.)

Q. (By Mr. Bantz): Would you examine Plaintiff's Exhibit 18, [47] please?

A. All right.

Q. Do you recognize that magazine?

A. Yes.

Q. What is it? A. Sun and Health.

Q. Is that the International Edition?

A. Well, I believe so, yes.

Q. What language is that printed in?

A. It is in various languages, about half in English, apparently.

Q. It is part in a foreign language; but the bulk of it is in a foreign language, is it not?

(Testimony of Mervin Mounce.)

A. No, about half of it.

Q. Would you look at pages 17 to 20?

A. Yes.

Q. With the exception of the last page, is that the only language in the book?

A. Well, that is approximately the same as in the front. That seems to be it.

Q. All right. Now, Mr. Mounce, you made a statement that the bulk of these magazines that were impounded were not in a foreign language. The truth of the matter is that the great majority of them are in a foreign language; isn't that right?

A. No, I don't believe so. I think there are only 300 copies [48] there. The bulk of the magazines that were brought in are Sun and Health. Helios was in a foreign language.

Q. You say that Helios, No. 27, the 300 volumes of that is in a foreign language? A. Yes.

Q. It was listed as 500 copies, and that is in a foreign language, isn't it? A. Yes.

Q. All right. It is in a foreign language.

A. Yes.

Q. Exhibit No. 23, Licht Und Schonheit, a hundred copies? A. Yes.

Q. And that is in a foreign language?

A. Yes.

Q. Exhibit No. 2, De Neue Zeit, is that right?

A. Yes, sir.

Q. Well, you didn't list this here in your manifest? A. No.

(Testimony of Mervin Mounce.)

Q. There were 300 copies and that is published about three times a year in a foreign language?

A. Yes.

Q. And you got the 300 copies? A. Sure.

Q. Actually, in Exhibits 6, 8, 12, 13, 15, 24, and 25, the Model Studier, those are, the bulk, just posed pictures, no [49] language at all; is that a correct statement?

A. There is text in both of these.

Q. There is text in most of them?

A. Yes.

Q. In what language?

A. English and other languages.

Q. But the bulk of those exhibits that I am talking about do not have any explanation of the nude pictures; is that right? A. Yes.

Mr. Rowan: If the Court please, I would like to be sure that the witness knows what you are talking about. I think it is only fair.

Q. (By Mr. Bantz): The bulk of this group of magazines have nothing but just nude pictures; is that right?

A. There are some nude pictures in here that are in the other one.

Q. Part 2 and Part 1; is that right?

A. I would have to examine them to tell whether it is 1 or not. I fail to see where that makes it obscene.

Q. You just answer the questions that I ask you. You have got a hundred copies of the Model Studier; is that correct? A. I would say yes.

(Testimony of Mervin Mounce.)

Q. Now, you got—you ordered the International Journal; is that correct? [50]

A. Yes.

Q. Now, referring to 1, 5, 7, 9, 10, 11, and 26, you say there are 4200 copies; is that right?

A. Yes.

Q. And they are in there? A. Yes.

Q. They are in a foreign language, aren't they?

A. No.

Q. There is English in them? A. Yes.

Q. What percentage of it, do you know?

A. Well, it must be about half. They published it that way so it is identical in Denmark and also in this country.

Q. Yes, but the pictures in Danish and the text —The bulk of the magazine, the different copies, are different in name and are in a foreign language, aren't they?

A. There are some forty publishers in the entire world. We don't make any designation.

Q. The wording in these magazines—In other words, they have nothing to do with it; is that a correct statement? I mean the pictures here are what are interesting in what they show?

A. Oh, no.

Q. You can't read it?

A. Well, if they are pictures that we are interested in—We handle language magazines. [51]

Q. That nobody can read?

A. Well, I wouldn't say that nobody can read.

Q. But they are in foreign languages?

(Testimony of Mervin Mounce.)

A. Well, as I have said, some of them are and some of them are partly in English. We naturally handle magazines that are—Well, some of them are in German.

Q. How many times a year do you order?

A. Oh, about two or three times a year.

Q. And some of them go to a news stand or news stands? A. Most of them go to a news stand.

Q. About 80 per cent?

A. I will not put it that way.

Q. Do you know how many go out?

A. No.

Q. You have no idea, but a great majority; is that right?

A. I would not say that unless I checked them. We sell a lot of them.

Q. Is there a domestic demand for Sun and Health? I mean, there are two different magazines, Sun and Health and——

A. I think they were published in French up until recently, and they publish a magazine that is all English.

Q. Well, I mean there is an international one that is in French or some foreign language, isn't that right?

A. Well, there is a Danish one called Sunbathers.

Q. I think you mentioned one this morning that is a domestic [52] one made here in the United States, Sun and Health. There is one; that is, Sunshine and Health that is printed here?

(Testimony of Mervin Mounce.)

A. Yes.

Q. Sunshine and Health is one of the nudist magazines printed in this country for the nudist organization? A. Yes.

Q. Is it sold only to nudists? A. No.

Q. It is for sale on the public news stands; is that right? A. That's right.

Q. The Sunbathers, is that published in the United States? A. Yes.

Q. Who publishers that? A. Vecsey.

Q. And that is a nudist magazine?

A. Yes.

Q. It is printed in the English language, though?

A. I believe the Sun Magazine has some foreign text in it. I think there is some Esperanto in there.

Mr. Bantz: May I have Plaintiff's Exhibit No. 19, please?

(The clerk handing the exhibit to counsel.)

Q. (By Mr. Bantz): I hand you Plaintiff's Exhibit No. 19, Mr. Mounce. What is the name of that magazine? [53] A. Helios.

Q. You handle Helios, do you? A. Yes.

Q. And you have sold it to your distributors, is that correct? A. Yes.

Q. Mr. Mounce, you made the statement that you received numerous letters in favor of your movement—the nudist movement. Have you ever received any bad publicity about the nudists?

(Testimony of Mervin Mounce.)

A. Do you mean letters from people——

Q. Letter or talk or something like that?

A. Oh, I have had some, yes.

Mr. Bantz: Will you mark this for identification, please?

(The magazine referred to was marked Plaintiff's Exhibit No. 35 for identification.)

Q. (By Mr. Bantz): Will you look at that Plaintiff's Exhibit No. 35? Do you recognize that?

A. Yes. February, 1955, a copy of Sunshine and Health.

Q. Is that one of the magazines that was particularly libeled in the case of Sommerville & Son, the Sommerville case that is now on appeal?

Mr. Rowan: What were those dates? I think it is March '51, to February of '52.

Q. (By Mr. Bantz): Do you know anything about the last Sommerville [54] case that was in the District Court of the District of Columbia in 1955?

A. Is that the one that was just refused?

Q. No, they refer to the Sommerville case. Do you know anything about the second one?

A. I am afraid not.

Q. You don't know whether it is one of the magazines that was discussed in that case, do you?

A. In the second case, no, I do not.

Q. What magazine do you print here in town?

A. It is called the American Nudist Leader.

Q. Do you take the pictures that you publish in

(Testimony of Mervin Mounce.)

your magazine? Are they taken from the other magazines that you receive? A. No.

Q. Do you take your own pictures? A. No.

Q. Do you obtain those from other magazines to make up your magazine?

A. That's right.

Q. They are not some of these magazines that we have confiscated?

A. No. We may have occasionally printed one of those pictures, but for the whole part they are all original pictures taken in nudist camps in this country.

Q. In this country? A. Yes. [55]

Q. And they are all printed in the English language? A. Yes, it is.

Q. Are you familiar, Mr. Mounce, or do you have anything to do with the case of Parmlee versus the United States? A. No.

Q. Are you familiar with that case?

A. I have read the opinion.

Q. Have you ever looked at the pictures in that particular magazine that they were discussing?

A. I believe I have.

Q. What was the difference in those pictures from the ones that we have just been looking at here? A. They are smaller.

Q. How much smaller?

A. Well, they are quite small.

Q. Actually, one of them is about two and a quarter by three and a quarter inches?

A. I think so.

(Testimony of Mervin Mounce.)

Q. You said you looked at the pictures? Is that correct? Is that a correct statement?

A. I believe so.

Q. In other words, these pictures are about 8½x11; is that correct? A. Yes.

The Court: What is that citation? [56]

Mr. Bantz: Permlee versus United States, at page 113, Federal Reporter, Second Edition, page 729, your Honor.

Mr. Rowan: Starting on page 5.

Q. (By Mr. Bantz): Do you have an order form that you put—that you advertise in your magazine so you can get other people to subscribe to your magazine? A. Yes.

Q. I mean in your local magazine?

A. I don't know just what advertising.

Q. In your magazine? A. Yes.

Q. Do you ever advertise in all their magazines?

A. I believe we have, yes.

Q. And yet you use these small order blanks for advertising and have——

A. (Interposing): I don't know what you mean.

Q. I mean they are not in your name; is that correct?

A. They are in the name of A & L Publishing Company, as an organization.

Q. And they send them to you or to the post office box in your name?

A. The post office box is in my name.

Q. Is it in your name? A. Yes. [57]

(Testimony of Mervin Mounce.)

Q. Do you have one in your neighbor's name?

A. No.

Q. Has it ever been in your neighbor's name?

A. One of them is in my wife's name, or was at one time. That has been three years ago. The last three years they have been in my name.

Q. Do you sell to the Indianapolis Lay Text Company? A. Yes.

The Court: What was that company?

Mr. Bantz: Indianapolis Lay Text Company.

Q. (By Mr. Bantz): Do you sell to the Main News and Sport Center? A. Yes.

Q. Where is that located?

A. Akron, Ohio.

Q. And you ship these copies to them that we are discussing here, the Darkey News?

A. Yes.

Q. Where is that located?

A. In San Francisco. We haven't shipped any foreign magazines to them for, I guess, about a year.

Q. How about the Wilbur Drug Company?

A. Yes.

Q. Where is that located?

A. I think it is in Seattle. [58]

Q. Is that on 121st Avenue, South? Could you look that up?

A. 120 First Avenue, South.

Q. What about K. Book Service?

A. The K. Book Service was in Cleveland, Ohio.

(Testimony of Mervin Mounce.)

Q. Do you ship to Susie's, Inc.?

A. We have shipped to them. I don't know about the present time.

Q. What state is that located in?

A. Chicago.

Q. Or in California?

A. She is in Chicago, Illinois.

Q. How about Ace News Agency?

A. Ace?

Q. Ace.

A. Ace?

Q. Yes. A. I don't remember.

Q. Have you ever shipped to anybody by the name of Eleanor J. Cesey?

(No response.)

Q. Do you ship to anybody in Woodbridge, New Jersey? A. I believe so.

Q. Do you ship to anybody at Woodbridge, do you know? A. Ace?

Q. Ace News Agency. [59]

A. I never heard of them.

Q. You don't have it there?

A. It may be here, but I can't remember the business style.

Q. But you do ship to somebody in Woodbridge, New Jersey? A. Yes.

Q. All right. Do you ship to the B & L News Service in Denver, Colorado?

A. Not in Denver, no. They cancelled.

Q. But you did ship to them? A. Yes.

(Testimony of Mervin Mounce.)

Q. How about Werness Distributing Company?

A. Yes.

Q. Where are they located?

A. In Los Angeles.

Q. They are shipping magazines that we are discussing here? A. Under the same title, yes.

Q. The same title? A. Yes.

The Court: It is time for court to recess. Court will be in recess until 1:30.

(Whereupon, a noon adjournment was taken until 1:30 o'clock p.m. of the same day.) [60]

Afternoon Session—1:30 P.M.

MERVIN MOUNCE

having been previously sworn, resumed the stand and testified further as follows:

Cross-Examination
(Resumed)

Mr. Bantz: Will you mark this for identification?

(The article referred to was marked Plaintiff's Exhibit No. 36 for identification.)

Mr. Bantz: I believe counsel will stipulate with me for the purpose of reading the case of Sunshine Book Co. versus United States, the last one, the two of the magazines and the pictures which are described therein are in Plaintiff's Exhibits No. 35

(Testimony of Mervin Mounce.)

and No. 36, and I am asking that they be admitted only for the purpose of comparison at the time of the trial in the first case, your Honor.

Mr. Rowan: There are two Sommerville cases, your Honor. I will stipulate that they may be used for that purpose.

Mr. Bantz: It is in the Circuit Court of Appeals in the District of Columbia.

The Court: It is in the Court of Appeals?

Mr. Bantz: Yes, your Honor. It is the Sunshine Book Company.

Mr. Rowan: Is that the one that Judge Coughlan sat in in the United States——

Mr. Bantz (Interposing): That is right. [61]

The Court: Exhibit No. 36 for identification will be received in evidence.

(The article marked Plaintiff's Exhibit No. 36 for identification was received in evidence.)

Q. (By Mr. Bantz): I hand you Plaintiff's Exhibit No. 34 for identification. I believe you identified these, did you? A. Yes, I think so.

Mr. Bantz: At this time I will offer these in evidence, Plaintiff's Exhibit 34. It is a card index.

The Court: Yes, that will be received.

(The Card index marked Plaintiff's Exhibit No. 34 for identification was received in evidence.)

Mr. Rowan: May I ask counsel to restate the purpose?

(Testimony of Mervin Mounce.)

Mr. Bantz: Your Honor, the purpose of it is just to show what has happened to these magazines in the past that we have been talking about.

The Court: He testified to that, I think. I will admit the exhibit in evidence.

Q. (By Mr. Bantz): Mr. Mounce, handing you a card from Plaintiff's Exhibit No. 34, which is marked "16" in the right-hand corner up there, what does that card indicate or what is that card?

A. It is a record of shipments of B & L Magazines shipped.

Q. Where is that located? [62]

A. Denver, Colorado.

Q. Now, I believe you said you made a sale to a place which is indicated on one of these cards. Is that correct? A. Yes.

Q. And it shows how many different types of magazines and when the sale was; is that correct?

A. Yes.

Q. Are you still selling to these people?

A. Not to this one, no.

Q. Do you know why you are not?

A. No, they just—they moved. I don't know where they are now.

Q. They could sell and buy from you if they wanted to, could they? A. Well, yes.

Q. I believe you testified, Mr. Mounce, that you thought these magazines could be sold by any news concern, any news agency, you will sell to them?

A. Well, if they appear to be a bona fide news agency.

(Testimony of Mervin Mounce.)

Q. And they can sell them to anybody they so desire?

A. Of course, they buy them. They do what they like with them.

Q. All right. Now, we have had quite a bit of discussion about nudists, about these magazines that are made up by you and by other companies. Is it correct to assume that the pictures are made up just to show what the average general nudist is like in [63] their actual camp life?

A. Yes, to illustrate the fact that the human body is wholesome in all respects.

Q. And as far as you are concerned, each picture does something? It illustrates something to benefit the nudist people; is that correct?

A. Well, to propagate the movement.

Q. What do you mean by "to propagate the movement"? Do you mean to increase it by seeing this type of pictures?

A. Yes. They advise some people of the fact that the human body is nothing to be laughed at or to be ashamed of.

Mr. Bantz: May I have Plaintiff's Exhibit 10, please, Mr. Clerk?

(The clerk handing a magazine to counsel.)

Q. (By Mr. Bantz): I hand you Plaintiff's Exhibit No. 10. Will you please turn to the third page? Now, it shows a picture on the third page of a man and his wife with two little girls, apparently; is that correct? A. Yes.

(Testimony of Mervin Mounce.)

Q. Now, that is a picture of what you usually find in the nudist colony or which you have at your camp; is that correct? A. Yes.

Q. And that picture was taken for the purpose of increasing the membership in your nudist movement? [64] A. I would say yes.

Q. All right. Now, just turn over two more pages to the picture of a girl. What does that picture show for the movement of nudists?

A. Well, in foreign countries—in European countries, that is one of their camp people.

Mr. Bantz: May I have Plaintiff's Exhibit No. 25?

(The clerk handing an exhibit to counsel.)

Q. (By Mr. Bantz): In looking at Plaintiff's Exhibit No. 25, will you just turn to the first picture of the man and the girl? A. Yes.

Q. It is the first page of the man and the girl?

A. Yes.

Q. Just tell me what does that picture do to assist the nudist movement?

A. It shows a human body as being entirely normal. I do not see any perversion or anything of that sort indicated. You take this picture and hold it alongside of some of the published magazines and you will be impressed by the wholesomeness of this photograph.

Q. All right. Now, taking Plaintiff's Exhibit No. 11, will you just turn to page 12? There is a picture of a lady in that, in the upper left-hand corner

(Testimony of Mervin Mounce.)

of the page. Now, would you tell me what that does for the nudist movement? [65]

A. Why, it has something to do with these pictures here, probably.

Q. And it is a large-busted woman; isn't that correct? A. Yes.

Mr. Bantz: Mr. Clerk, will you hand me Exhibit No. 26?

(The clerk handing the exhibit to counsel.)

Q. (By Mr. Bantz): Would you take that magazine, which is Plaintiff's Exhibit No. 26, and turn to the middle page just opposite where it says, "International Journal," page 16, a girl standing in a tree? A. Yes.

Q. Will you just explain again what that has to do with the nudist movement?

A. Oh, I don't think it has anything more than I see some kids climbing trees.

Q. Is that a kid or a pretty good-sized girl?

A. It looks like a child to me.

Q. It has a considerable amount of pubic hair; is that right? A. Apparently.

Q. And the line of the vagina is quite obvious?

A. Not to me. It is quite a shadow, right opposite the middle of the back.

Q. Now, in the last one I will hand you——

Mr. Bantz: Mr. Clerk, would you hand me [66] Plaintiff's Exhibit No. 15?

(The clerk handing the exhibit to counsel.)

(Testimony of Mervin Mounce.)

Q. (By Mr. Bantz): And turning to the last page before the cover, the girl leaning against, or sitting on some stairs. A. Yes.

Q. Will you just tell me what that has to do with the nudist movement?

A. I would have to state the same as with some of the others; that there is nothing wrong with the picture. It shows the human body, which is not obscene.

Q. All right. Now, Mr. Mounce, in conclusion; all of these pictures that I have just shown you and all these magazines that we are discussing—with reference to the great majority of them, they are well-developed, large-busted women or reasonably so, aren't they, good-looking girls?

A. I don't agree with that.

Q. We have gone through all those magazines, I am assuming. With the exception of the family pictures, do you find many women there, standing close by, that have sagging breasts, and big-potted bellies? A. No.

Q. In other words, the bulk of them are nice, young looking model girls?

A. I don't understand the question. [67]

Mr. Bantz: Mr. Reporter, will you read the question, please?

(The question was read by the reporter.)

A. I think that as a rule they are a pretty good cross section of the women. These women are somewhat stouter.

(Testimony of Mervin Mounce.)

Q. And you find that the bulk of the persons posing for these pictures are what is commonly known to outsiders as model-type girls with more developed, rounded busts and buttocks; isn't that true?

A. I don't think so. It would be natural, if you are going to take a picture, to make the best picture that you could get.

Q. Now, reviewing in your mind the pictures, where there is a group of nudist women, there are, say, eight or ten of them, and there are numerous of them in there? A. I will admit that.

Q. Do you find in this case that always, those lovely girls here are the average-looking women, like my wife; that is, borne a couple of children and so forth?

A. There are lots of women in the nudist movement—in fact, it is especially a family organization.

Q. Where do all these girls in these magazines, 1 through 27—are they all in the organization?

A. I don't know. Now all of these foreign magazines—some of them, I am sure, are. I will say most of them are taken in a nudist camp abroad. [68]

Mr. Bantz: Would you hand me Exhibits 28 through 31, Mr. Taylor?

(The clerk handed the exhibits to counsel.)

Q. (By Mr. Bantz): Just to keep the record straight, Mr. Mounce, we have some books here that

(Testimony of Mervin Mounce.)

were confiscated by the Government. Is that correct? A. Yes.

Q. Do you operate Lee Craft Service?

A. No.

Q. Did you ever operate it?

A. We did, yes, at one time.

Q. I mean, you have sold that now?

A. No, it does not exist.

Q. Who is Jane Mahar?

A. Well, there is nobody by that name.

Q. Well, but was that one of your studio names?

A. That was my wife's name before we were married.

Q. And she is one of those that these magazines are sold through? A. Well, yes.

Q. How do you advertise these books, Mr. Mounce?

A. These books are advertised only in the AFA edition of the American Sun—the association edition of the official journal that goes only to registered members of the association.

Q. How do you contact these dealers? [69]

A. Well, we have a salesman that goes out and contacts some of them.

Q. You have a salesman that contacts them throughout the country?

A. No, not one who contacts them throughout the country. He just works here in the Northwest.

Q. Are there any dealers in this country for these magazines other than you?

(Testimony of Mervin Mounce.)

A. Oh, at the present time I believe they are shipping to other persons in this country.

Q. Do you have any more ideas now of how many copies you sell in one year than you did this morning?

A. Well, we sell, oh, perhaps, 5,000 copies a month, on the average.

Q. 5,000. In other words, about 60,000 a year through your company?

A. Perhaps not that much. Some of them come every other month; but I suppose between 3,500 or 4,000 a month.

Q. All right. And you do make a profit on them?

A. Yes. My estimate is that we make probably $750 a year on these foreign magazines, but it does not justify the office expense and traveling and so forth to handle them.

Q. Mr. Mounce, if you sold them for 57c each—isn't that on the list that goes out to wholesalers?

A. Yes. [70]

Q. You sell them for 50c——

A. (Interposing): They cost, laid down here, 35c.

Q. Does your manifest show your cost as 35c?

A. On Sun and Health.

Q. On all of them?

A. Some of them are listed, the listed price there. There is a list—they are listed at a certain price and then there is import, freight, and insurance and——

Q. (Interposing): But the profit on one of those is less than 10c—that is the rate on 10,000?

(Testimony of Mervin Mounce.)

A. On a couple of them it is. That is a broad—that is a different price. That is what it is laid down here for. You should take a look at the cost card, and you will find some that probably will never pay. I might show you a great many others in there, too.

Q. Do you sell magazines to the Harbor Drug Store in Seattle? A. Yes.

Q. And to Close Cut-Rate Store in Seattle?

A. Yes.

Q. How many years have you been in this business that we are discussing right here, Mr. Mounce?

A. I think about five years, if I remember right.

Q. This is not your sole livelihood?

A. Oh, no; heavens, no. I would starve to death. The bulk of my income comes from property rented—about two-thirds of it. [71]

Mr. Bantz: I think that is all.

Mr. Rowan: Just for the purpose of further identifying Defendant's Exhibits 30 and 31, I would like to read just an excerpt from the decision of Judge Schweinhaut, it being an unpublished report. It is dated July 13, 1953—I have shown this to counsel, and is as follows:

"Ordered, adjudged and decreed:

"(1) That the publications, "Sun and Health" and "Sun Magazine," are not obscene and do not fall within the provisions of 39 U.S.C.A., Section 259 (a)."

Mr. Bantz: I am assuming that is being taken with the same understanding as before.

(Testimony of Mervin Mounce.)

The Court: It is the District Court here, I assume?

Mr. Rowan: The District Court of the District of Columbia.

Redirect Examination

By Mr. Rowan:

Q. Now, Mr. Mounce, Exhibit No. 26, about which Mr. Bantz inquired and referred to, page 9 of that exhibit, and I ask you particularly about page 8 and the picture there. Page 9 is headed what? A. "Our Aims and Ideals."

Q. And is it one paragraph?

A. It is a column in English, extended over several pages.

Q. And is it entirely about nudists? [72]

A. Yes, it is.

Q. Now, I will refer you to Plaintiff's Exhibit No. 12, and counsel asked you, and I believe you replied that you saw no printed matter there. Will you refer to the front of that magazine? Do you see anything printed on there? A. Yes.

Q. Is it part in English? A. Yes.

Q. What is the name?

A. Fmbert's. That is the name they publish.

Q. I refer to the back of the magazine. What other words appear on the front in English?

A. "Figure Drawing."

Q. Now, turn to the back of the magazine. Do you find anything on that which indicates what the magazine is?

(Testimony of Mervin Mounce.)

A. No. 3. It is published by the Nudist Publishing House, and it gives the date.

Q. What is that magazine, Model Studier, published for? A. I think that is published——

Mr. Bantz (Interposing): I will object to what he thinks, unless he knows of his own personal knowledge.

The Court: I think the question is to find out what it is.

Q. (By Mr. Rowan): What is it acquired by you for? [73]

A. To illustrate the wholesomeness of the human body.

Q. And will you refer to Plaintiff's Exhibit 18? Will you turn to page 19 of that exhibit?

A. All right.

Q. Is there any article there in English?

A. Yes.

Q. Go ahead.

A. The caption here, or the title is, "Prohibition of Nakedness More Immoral Than Nakedness Itself."

Q. And that runs over on the next page, does it not? A. In English, yes.

Q. Now, Mr. Mounce, counsel asked you about where you distributed or sold these magazines, and I understood you to say that you sold them sometimes on the skid road. Did you so state?

A. I don't believe so. I think that I said that they might be sold on skid road, and I am not ex-

(Testimony of Mervin Mounce.)

actly sure what the term "skid road" is defined to mean.

Q. Will you explain to us where you do sell them, and what precautions you took along that line?

Mr. Bantz: Your Honor, I think that question has been gone over.

The Court: I think he said he didn't know the location or what they did on skid road.

A. Well, do you mean cheaper streets of the town?

Q. (By Mr. Rowman): We will say Main or Trent. [74]

A. Well, Mr. Rowan, that may occasionally be. I don't think that I said that.

Q. Or Trent Avenue, either?

A. Or Trent Avenue, either.

Q. Do you sell them only to those you consider are responsible dealers? A. Oh, certainly.

Q. Now, your own magazine is printed here in Spokane? A. Yes.

Q. And the printer reproduces the pictures that are used? A. Yes, sir.

Q. As a matter of fact, he discussed the matter of coming down and testifying, did he not?

A. Yes.

Q. And he didn't want to testify solely because of other clients in town?

Mr. Bantz: If he doesn't want to come down, just let him—I object to just hearsay testimony.

(Testimony of Mervin Mounce.)

The Court: I think that is objectionable. I will sustain the objection.

Q. (By Mr. Rowan): At any rate, they are published by a local responsible printer?

A. Yes.

Q. Did you see the picture, "Garden of Eden"? That was shown [75] here some time ago. Do you know whether or not that picture was first banned by the censor? A. It was.

Q. Do you know whether it was later released and shown here? A. It was.

Q. Was that a picture—an actual picture reproduction of the nudist camp in Florida?

A. Yes.

Q. And did it show the same views of various persons in the nude? A. Yes.

Q. Did it show the whole nudist camp?

A. Yes, it did.

Q. Were there men, women, and their children in nude going out to swim and going to the camp every morning? A. Yes.

Q. Did you consider that obscene?

A. Definitely not.

Q. Now, you said, I believe, in answer to counsel's question that there was a limited profit here, but not much. Did I understand you to estimate the amount per year, month, or some other——

A. Yes. I do operate different rentals on different properties that I hold, and I deducted the payments made to the mortgage holder, which includes taxes, interest, and so forth, and the income on it,

(Testimony of Mervin Mounce.)

and I figure that amounts to about two-thirds [76] of my income, and I estimate that there is about $5,916 coming from rentals, and we reported on, I think, about $9,000 before taxes.

Q. That was your income report?

A. And I estimate that the income from our own official journal is about $2,250.

Q. How much does that leave you per year from these magazines?

A. I have $750 for magazines, which brings our total income to $9,910, which has no connection with what it actually was. These are rough figures.

Q. Will you handle these magazines that are attempted to be libeled here at all?

A. No, and I feel sometimes that——

Mr. Bantz: I object to that as not responsive to the question.

A. (Resumed): If I didn't think they promoted the nudist movement, I would not handle them, no. I have other ways to make a living besides that.

Mr. Rowan: That is all.

Mr. Bantz: I have about three questions, your Honor.

Recross-Examination

By Mr. Bantz:

Q. With reference to the picture, "Garden of Eden," did you see the picture?

A. Yes, sir; twice. [77]

Q. Now, you stated in there that they had the same pictures that are in these magazines?

(Testimony of Mervin Mounce.)

A. No, sir; I did not say that.

Q. Well, I mean they had the same type of pictures? A. No.

Q. What was in the "Garden of Eden"? Every time they got up close to people, they had on clothes; isn't that correct, in that picture? A. No.

Q. Did you see any picture in there of nakedness standing out where you could see the vagina showing on a big screen in any of those pictures?

A. No, sir.

Q. Did you see any of them where they were standing up, boys and naked men and women?

A. I didn't see anything objectionable on the screen.

Q. Isn't it true that every time they were close, it was when they were walking by with their backs showing in that picture? Isn't that the truth?

A. Yes, sir.

Q. And if you sold 35,000 magazines at 20c apiece, doesn't that appear to be about $7,000 profit?

A. No. You have quite an investment in there, and where you sell these people magazines, that costs quite a sum of money to do that. The gross profit is not profit. Gross profit and net [78] profit are two different things. I suppose there may be $6,000 or $8,000 in accounts receivable which we will never collect.

Q. If they don't pay you, do you send them back a second shipment?

A. Well, yes, sometimes they will get two or three shipments and they appear to be——

Mr. Bantz: That is all.

The Court: That is all, Mr. Mounce.

(The witness was excused.)

MRS. FAITH MARKELL

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Rowan:

Q. Will you state your name and age, Mrs. Markell?

A. Mrs. Faith Markell, fifty-two years of age.

Q. And your occupation?

A. I beg your pardon?

Q. What is your occupation?

A. Well, housewife.

Q. And you reside here in Spokane?

A. Yes.

Q. How long have you lived here?

A. Since the fall of 1924. Not exactly in the city all that [79] time, but in this immediate location.

Q. Are you married? A. Yes.

Q. And have a family?

A. Yes; six children.

Q. How many? A. Six.

Q. How old are they?

A. The oldest one is twenty-five—do you want them all?

Q. Down to what? A. Down to fourteen.

Q. What does your husband do?

(Testimony of Mrs. Faith Markell.)

A. He has been a floor contractor most of the time we have been in this country.

Q. Well, now, he is what?

A. Floor contractor.

Q. And he was unable to be here today?

A. Yes, sir.

Q. Are you a member of Sunway?

A. Yes.

Q. Were you a charter member? A. No.

Q. How long have you been members?

A. Going on eleven years.

Q. And your organization is a nudist organization, is it? [80] A. Yes.

Q. And do the members believe in nudism?

A. Yes.

Q. Do they practice it? A. Yes.

Q. You heard Mr. Mounce's testimony about the camp? A. Yes.

Q. Do you have friends who are non-nudists?

A. Yes, I do.

Q. Do you have friends who are non-nudists that you take to your camp? A. Yes.

Q. When?

A. Well, some time during 1954, during the summer I took them several times up there. I had them up once this year.

Q. Calling your attention to various nudist magazines that are published, are you familiar with them? A. Yes.

Q. What ones, for example, are you familiar with?

(Testimony of Mrs. Faith Markell.)

A. Well, I have seen just about all of them. I didn't notice particularly all of them all the time, but I would buy different copies of different issues.

Q. You would get some of them from time to time?

A. We used to subscribe all the time to Sunshine and Health, but we are not at the present time subscribing for any of the [81] magazines.

Q. I call your attention to Plaintiff's Exhibit No. 18 and ask you what that is?

A. Sun and Health.

Q. Have you ever seen those magazines?

A. Not possibly that particular one. I just saw them.

Q. You know that magazine itself?

A. Yes.

Q. Are you familiar with the magazine, Plaintiff's Exhibit No. 16?

A. No, I don't believe I ever saw that particular book before.

Q. How about the National Journal?

A. Yes, I have seen several copies of that.

Q. Exhibit No. 21. Now, will you turn through Exhibit No. 21, for example? Do you know what that magazine is put out for?

A. Well, of course, I can't read the text of those magazines. They are very similar to the pictures I saw in our own magazine.

Q. Is there anything in that magazine, Exhibit No. 1, that you and your people consider obscene?

(Testimony of Mrs. Faith Markell.)

A. No, because a picture of the human body is not obscene.

Q. Will you tell us why not?

A. Because obscenity is not of the body. It is only of the mind.

Q. Is that what the nudist movement teaches?

A. Yes. [82]

Q. They have taught that nudism is wholesome?

A. I believe there is an authority in connection with this very particular principle, which is that "A healthy mind, a healthy body."

Q. Do you or the nudist people think that a person who is in the nude and who is seen standing by a person of the opposite sex in the nude, do you think there is anything sexy or dirty about that?

A. No, there absolutely is not. That is one of the things that we believe in is the fact that we can meet a whole family on an equal basis without sex entering into the picture.

Q. Do you do that in your nudist camps?

A. We do.

Q. Do you, in fact, prohibit anything sexy in the camps? A. Yes.

Q. Do you prohibit liquor in the camps?

A. Very definitely.

Q. Are the people, generally, in the nudist camps as moral as the average group of people?

Mr. Bantz: Your Honor, I object to that question, as to what happens in a nudist camp, and I think it has nothing to do with the magazines here.

(Testimony of Mrs. Faith Markell.)

that I can see. I think we are going beyond the scope of the issues in this case.

The Court: It has to do with the defense. I think she may answer the question. [83]

A. We have to adhere to a strict moral program. There is absolute equality. Take, for instance, a husband and wife. They are not allowed to show any affection or kissing or anything like that. It is prohibited within the areas of the camp.

Q. Is that why these magazines here are put out, to help promote——

Mr. Bantz: I object, if your Honor please. That is not responsive.

The Court: I think that is all right. The witness may answer the question.

(The question was read by the reporter.)

A. Yes, that is the sole purpose of it, because so many people have to—they can't realize——

The Court: It seems to me that it would perhaps be competent, that these pictures are not regarded obscene by the nudist people. The nudist people do not regard the human body as obscene.

Mr. Rowan: I think that is correct. I will not pursue that.

Mr. Bantz: I will stipulate that the nudist people would all testify to that.

Q. (By Mr. Rowan): In all these pamphlets that you have seen here, have you ever seen a written word of either filth or obscenity in any way, shape, or form? A. No. [84]

(Testimony of Mrs. Faith Markell.)

Q. Do the pictures illustrate the written text so far as you know?

A. So far as I know, yes. I might find out that there is in some of the publications——

Mr. Bantz: Your Honor, I will object to that.

The Court: Yes. That is volunteered. You should testify in response to the questions. I think the Court understands pretty well the principles of the nudist movement.

Mr. Rowan: I think that is all.

Cross-Examination

Mr. Bantz: I have two questions right there, your Honor.

By Mr. Bantz:

Q. I take it that you say you have not seen any written words of obscenity in the language in any of these magazines. Are you familiar with the magazines that we have been discussing here?

A. Yes.

Q. Can you read French and German and Swedish yourself? A. No, I can't.

Q. Have you any knowledge that there would not be some obscenity in it?

A. Personally, I have never seen it.

Q. You cannot read the language?

A. Oh, we have some translations. [85]

Q. I am talking about you. Can you tell me this: Have you ever seen—you say you can't read it?

A. No.

(Testimony of Mrs. Faith Markell.)

Q. All you can do, then, is see the pictures. And I want one other thing. Do you belong to a nudist colony or group that has children?

A. Oh, yes.

Mr. Bantz: That is all I have.

Mr. Rowan: That is all.

(The witness was excused.)

ARTHUR W. BAUMAN

was called as a witness by the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bantz:

Q. What is your name, please?

A. Arthur W. Bauman.

Q. Where do you live, Mr. Bauman?

A. Seattle. Washington.

Q. What position do you have?

A. I am United States Customs Agent.

Q. Now, Mr. Bauman, how old are you?

A. Thirty-eight.

Q. How long have you been with the Customs Service? [86]

A. Approximately five years. Two years in the capacity I am in now.

Q. Now, Mr. Bauman, did you purchase a magazine named Helios in Seattle of recent time?

A. Yes, I purchased one.

Q. Do you have it with you? A. Yes, I do.

(Testimony of Arthur W. Bauman.)

Mr. Bantz: May I have that marked Plaintiff's Exhibit No. 37, Mr. Clerk?

(The magazine referred to was marked Plaintiff's Exhibit No. 37 for identification.)

Q. (By Mr. Bantz): I hand you Plaintiff's Exhibit No. 37. Is that the magazine that you purchased in Seattle? A. Yes, sir.

Q. Where did you purchase the magazine?

A. I purchased the magazine at the Country Store in Seattle.

Q. When did you purchase that?

A. On August 23, 1955.

Q. Did you make a notation on that particular magazine? A. Yes, I did.

Q. What does that notation show?

A. Purchased from Country Store, 703 Stewart Street, on August 18, 1955.

Q. Is that your writing? [87]

A. Yes, it is.

Q. Mr. Bauman, when you purchased the magazine, Plaintiff's Exhibit No. 37, were you asked, or did you have any trouble purchasing that magazine? A. No, I did not.

Q. You just went into this store and purchased it? A. Right.

Q. And it was out in the front counter?

A. It was in a counter—a glass display counter filled with magazines of this shape and also magazines that were displayed on top of the counter.

(Testimony of Arthur W. Bauman.)

Mr. Bantz: Your Honor, I am offering Plaintiff's No. 37 into evidence.

Mr. Rowan: No objection.

The Court: It may be admitted as Plaintiff's Exhibit No. 37.

(The magazine marked Plaintiff's Exhibit No. 37 for identification was received in evidence.)

Q. (By Mr. Bantz): Where in Seattle is this store?

A. Just off—between Seventh and Eighth Avenues on Stewart Street.

Q. Where with reference to the Greyhound Central Bus Depot?

A. It is approximately a block from it.

Q. Are you familiar with other sections of [88] Seattle? A. Yes, sir.

Q. Where is First Avenue? Did you hear the testimony about some other stores in Seattle?

A. Yes, I did.

Q. Do you recall the address?

A. I think it was on First, 120 South First Avenue.

Q. 120 South First. Do you know where that would be? A. Yes.

Q. Where is that?

A. It is in the lower area commonly known as the skid road of Seattle, a poorer district.

Mr. Bantz: I have no further questions.

(Testimony of Arthur W. Bauman.)

Cross-Examination

By Mr. Rowan:

Q. What do you mean by "poorer district"? You say 120 South First Street is in the poorer section of Seattle. Are you standing on that?

A. It is in the poorer district of Seattle.

Q. What do you mean by "poor"?

A. Well, I would say the older section.

Q. Well, this section is the nearest, closest to the water, isn't it, in Seattle?

A. I beg your pardon?

Q. The older section is nearest to the water? Seattle is built around it, is it not? [89]

A. Yes, part of it is.

Q. Do you mean the place that the Geyhound Bus Line just lets its people off in a skid road part of Seattle?

A. No, that is not the central bus part of town.

Q. The bus line is on Seventh?

A. Eighth and Stewart.

Q. Just one more question. Did you read the magazine that you purchased? Did you read the English parts? A. Part, yes.

Q. Did you read the part which says:

"In my opinion everything which is natural is created as beautiful. Especially does that seem to me that man is the most beautiful of created things."

Mr. Bantz: What are you reading from?

(Testimony of Arthur W. Bauman.)

Mr. Rowan: I am reading from No. 18.

Mr. Bantz: You are reading from Sunshine and Health and it appears on the front of Helios?

Mr. Rowan: It is Helios, No. 18.

The Court: Exhibit 37, the same as Exhibit No. 18.

Mr. Bantz: No, I don't have the Helios number as 18 here.

Mr. Rowan: I will withdraw my objection to that. I have no objection to that. However, it seems to me to be No. 18.

The Court: I have two, but it is No. 18, right under [90] the white tab. I misunderstood that.

Mr. Bantz: I did not attempt to do that, your Honor. I was identifying it.

Q. (By Mr. Rowan): Did you read any part of the magazine that you purchased?

A. Yes, sir; I did.

Q. Did you read that part of it which refers to the Bible as the utmost——

A. (Interposing): No, I read an article, but just exactly what it was, I can't remember.

Q. Did you read anything that was dirty?

The Court: I don't think that is proper cross-examination. This witness has not expressed any opinion as to whether a magazine was obscene.

Mr. Bantz: He testified that it had been sold at a store.

The Court: Is there any other objection?

Mr. Rowan: I don't believe there is any objection.

(Testimony of Arthur W. Bauman.)

Mr. Bantz: I believe Mr. Mounce testified that he sold Helios in this store.

Mr. Rowan: Is that one of the magazines that are attempted to be libeled?

Mr. Bantz: I stated specifically that it is not one.

Mr. Rowan: And that is the only place?

Mr. Bantz: That is right. [91]

The Court: I will overrule the objection.

(The witness was excused.)

FRED H. BRANDT

was called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name, please?

A. Fred H. Brandt.

Q. Mr. Brandt, where do you live?

A. Seattle.

Q. By whom are you employed?

A. The Customs Agency Service.

Q. How long have you been employed by the Customs Agency Service?

A. About thirty years.

Q. What is your job with them?

A. I am Assistant Supervisor of the Customs Agency.

Q. All right. Mr. Brandt, are you acquainted

(Testimony of Fred H. Brandt.)

with Mr. Mounce who has been on the stand previously here? A. Yes, sir.

Q. Have you been out to his place of business and talked with them?

A. On two occasions. [92]

Q. And did you discuss with him these magazines that we have had under discussion here today?

A. Yes.

Q. Did you discuss with him about what orders that he made, or might have given, to his agencies that he sold these magazines to? A. Yes.

Q. What was that conversation?

A. He stated that there were no restrictions on the resale of these magazines.

Q. When was that discussion?

A. May 18, '55.

Q. At his home here in Spokane?

A. No, at his place of business.

Q. At his place of business?

A. East No. 1 Dalton Street, in Spokane.

Mr. Bantz: That is all I have.

Cross-Examination

By Mr. Rowan:

Q. He just told you there were no restrictions to the resale. He didn't tell you then that, "We sell for nudist promotion"? A. No, he did not.

Q. Did you know that to be a fact, or didn't you? A. No, I did not.

Q. Do you think now, after you have heard the

(Testimony of Fred H. Brandt.)

testimony, that [93] they are sold for commercial business? A. I don't think——

Q. What do you think they are sold for?

A. I think it is a commercial transaction.

Q. You heard the testimony as to his income?

A. Yes.

Q. You don't believe that, however, do you?

A. I have no proof of that.

Q. Well, if what he said is so, that he says he put in a considerable portion of his time to get approximately $750, do you think that is for a commercial purpose?

A. Well, it might not be; I wouldn't know.

Q. I beg your pardon?

A. I wouldn't know.

Mr. Rowan: That is all.

Mr. Bantz: I have nothing further.

(The witness was excused.)

MRS. ARRAH HOERNER

was called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bantz:

Q. Will you state your name?

A. Mrs. Arrah Hoerner. [94]

Q. Where do you live, Mrs. Hoerner?

A. 820 West Jackson.

Q. May I ask your age, please? You are above

(Testimony of Mrs. Arrah Hoerner.)

forty years of age? A. Yes.

Q. Do you have any children? A. One.

Q. What age? A. I have a daughter.

Q. And is she married now? A. No.

Q. Mrs. Hoerner, do you belong to any nudist association? A. No, I don't.

Q. Have you ever seen me before?

A. No.

Q. Have you ever seen any magazine such as I have in my hand here, before?

A. I don't believe so.

Q. Would you just take about five minutes and thumb through these magazines, starting with the top one in the corner? I want you to look carefully at them. Don't just thumb through them. Have you seen enough of them now? A. Yes.

Q. Mrs. Hoerner, do you feel that you live an average life, of community activities? [95]

A. I think so.

Q. Do you engage in the ordinary social activities, such as going to shows and dances, or the sort of thing you did in your younger days?

A. I still do.

Q. Do you occasionally have a drink or a cocktail? A. Yes, I do.

Q. Do you think that you are prudish about anything that you would consider an average day's occurrences? A. No.

Q. Mrs. Hoerner, examining these magazines, I will ask you as a non-nudist, and an average lady, what is your opinion on these magazines?

(Testimony of Mrs. Arrah Hoerner.)

Mr. Rowan: Just a moment. I will object to that.

The Court: This is not cross-examination. I will overrule the objection.

Q. (By Mr. Bantz): What is your opinion, Mrs. Hoerner? Just state your opinion as to whether you feel it is obscene or not obscene.

A. Well, I would want that matter in my mind before——

Q. Do you feel it is obscene or not obscene?

A. I do.

Q. Do you allow this material in your home?

A. No.

Q. Do you read Swedish? [96] A. No.

Q. Or any foreign language?

A. No, I do not.

Q. I will hand you Plaintiff's Exhibit No. 8. Would you carefully thumb through each page of that? Did you read any of the text in that exhibit?

A. No, just the pictures.

Q. And would you also look at Plaintiff's Exhibit No. 25? Do you find any text in Plaintiff's Exhibit No. 25?

A. Yes, there is one short text.

Q. Now, just take a minute and read that text, will you? I will ask you this: Mrs. Hoerner, after having looked at Plaintiff's Exhibit 8 and Plaintiff's Exhibit No. 25, and having read the article—that is, the only article in the magazine, Exhibit 25, has your opinion been changed in any way as to what you stated to me?

A. No, it has not.

(Testimony of Mrs. Arrah Hoerner.)

Cross-Examination

By Mr. Rowan:

Q. Who called you as a witness, Mrs. Hoerner?

A. I beg your pardon?

Q. How did you come to be a witness in this case? A. I was asked to come.

Q. By whom? Do you know who it was?

A. Mrs. Windham called me. [97]

Q. Who? A. Mrs. Windham.

Q. A little louder, please.

A. She is in the District Attorney's office.

Q. She called you? A. Yes.

Q. Are you an old friend of hers?

A. I have known her for some time.

Q. Have you ever worked in the District Attorney's office? A. No.

Q. But you have known her for some time?

A. Yes.

Q. Mrs. Hoerner, have you ever been in any of the stores and examined any of the national magazines in Spokane? A. No.

Q. Have you ever read "Time" magazine?

A. Yes, I have.

Q. Did you pick it up? A. Yes.

Q. Do you recall the picture of a group of nude people in the August, 1955, issue of "Time"?

A. Yes.

Q. Did you see them? A. Yes.

Q. Was it obscene? [98]

(Testimony of Mrs. Carrah Hoerner.)

A. A little bit to me.

Q. You would not care to have that in your own home? A. No.

Q. How about National Geographic? Did you take that? A. I used to, yes.

Q. Did you quit it? Did you quit it because it was too obscene? A. No.

Q. Have you ever seen, from time to time, these people in the nude? A. I don't remember.

Q. In the National Geographic?

A. I don't recall.

Q. Were you taking it about last year?

A. No.

Q. Two years ago?

A. No, about five or six years ago.

Q. Do you recall at times when they have published pictures of entire colonies and groups of nude people? A. I don't remember seeing that.

Q. And of paintings that you have seen in offices where you have been—paintings of people in the nude? A. I may have; I don't remember.

Q. Do you recall a picture by anyone, a painting by anyone of a nude person, male or female? [99]

A. Oh, yes. I believe not. I don't remember. It may have been.

Q. Was it obscene?

Mr. Bantz: Your Honor, I will object. There isn't any contention that art or sculpturing is obscene.

The Court: I don't think it is the contention that the old masterpieces are obscene. I think he has a

(Testimony of Mrs. Arrah Hoerner.)

right to cross-examine to get her viewpoint. I will overrule the objection.

Q. (By Mr. Rowan): Will you answer the question? A. What was the question?

(The question was read by the reporter.)

A. Do you mean the painting?

Q. Yes.

A. In comparison with these pictures?

Q. Comparative obscenity. A. Yes.

Q. Will you define to this Court what you mean by the word "obscene"?

A. Well, if it is immoral.

Q. When is it immoral?

A. Well, when it comes to the suggestive side, it is not proper.

Q. When is it suggestive, then?

A. These pictures are suggestive. [100]

Q. Why?

A. Well, for one thing, they show too much of the young man's body.

Q. To you, nudism is obscene, is it not?

A. Yes, nudism is obscene, but not with the old paintings.

Q. Well, is it obscene?

A. It all depends on where you see.

Q. Would it be so in a nudist camp?

A. I have never been——

Q. (Interposing): Would it be in the home?

A. Well, I could not say.

Mr. Rowan: That is all.

(Testimony of Mrs. Arrah Hoerner.)

Mr. Bantz: That is all.

(Discussion about calling more witnesses.)

Mr. Rowan: I want to ask one more question.

Q. (By Mr. Rowan): Will you refer to Plaintiff's Exhibit No. 26, and in particular, page 9 of that magazine? Will you read the first column on that page to yourself? On the next page, just the first paragraph, please. It is short. Do you find a word there about obscenity? A. No.

Q. Is there anything there that would not be perfectly proper in any place or any time, in the entire article with reference to their anniversary of the publication and the nudist movement? [101]

A. No.

Mr. Rowan: I think that is all.

Mr. Bantz: That is all, your Honor.

The Court: The court is in recess for ten minutes.

(A ten-minute recess was taken.)

The Court: You may proceed.

Mr. Rowan: Call Mrs. Sutherlin.

MRS. JAMES SUTHERLIN

was called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Rowan:

Q. Your name is Sutherlin? A. Yes.

Q. Your full name?

(Testimony of Mrs. James Sutherlin.)

A. Mrs. James (Pauline) Sutherlin.

Q. And you reside here in Spokane?

A. Yes, I do.

Q. How long have you lived here?

A. I have lived here twenty-nine years.

Q. And, as Mr. Bantz puts it, you are over forty years of age? A. Yes.

Q. Do you have a family? A. Yes. [102]

Q. What does your husband do?

A. A railway postal clerk.

Q. And he could not be here today?

A. That's right.

Q. Do you have children?

A. We have a son.

Q. Are you a member of Sunway?

A. Yes, we are.

Q. Were you and Mr. Sutherlin two of the charter members of the organization here?

A. Mr. Sutherlin and I organized the group here.

Q. You are a nudist in your beliefs and practices? A. Yes.

Q. Do you believe that nudism is proper and healthful and wholesome?

A. I most certainly do.

Q. Are you familiar with various magazines which I will show you: International Journal, De Neue Zeit, Sunshine and Health and these various magazines? A. Yes, I am.

Q. You have seen them? A. Yes.

Q. And read them? A. Yes, sir.

(Testimony of Mrs. James Sutherlin.)

Q. You have taken them in the home and subscribed for them? [103]

A. No, I never subscribed for them.

Q. Do you use them in the home?

A. We take them in the home occasionally.

Q. Have you ever, in any of those magazines, read anything that is dirty, filthy, obscene or sexy?

A. To our way of thinking, I do not think that anyone that is clean—that has a clean mind, could find anything wrong with them.

Q. The pictures, if you will notice anything, either a word or a sentence that you care to look at, Mrs. Sutherlin, are the pictures used to illustrate the text?

A. Yes, I believe so. I think they are merely for a work of art. I think there is one magazine there that you referred to——

Q. The Model Studier? A. Yes.

Q. Yes. Does not that have much written matter? Do you know what that is about?

A. I think that is to explain the copy there.

Q. Is there anything in that that is objectionable to the nudist people?

A. Well, speaking as a nudist, I would say not.

Q. Do you know people who are not nudists with whom you have associated and whose children you have taken to the nudist camp?

A. Yes, I do.

Q. Do you know whether those people consider nudism obscene? [104]

Mr. Bantz: Your Honor, I will object to that.

(Testimony of Mrs. James Sutherlin.)

The Court: That would be hearsay.

Q. (By Mr. Rowan): You have taken the children of other people who are not nudists to the colony? A. Yes.

Q. You are, of course, acquainted with the camp at Deer Lake? A. Yes.

Q. Did the people who came there take their children with them? A. Yes, they do.

Q. What about the moral restrictions in the nudist camp?

A. We never allow children to go off by themselves. We lived on a public beach one summer, and I would say that that would not be a proper place to bring up a child. The actions and the language on that beach, I would not want my son around that type of people. In the nudist park, they are strictly taught and watched, and we have very strict rules. We allow no smutty stories and not even husband and wife showing a display of affection for each other. We think there is a time and place for such things. We don't want to do that in public.

Q. What about drinking and so on?

A. We do not allow drinking.

Q. Will you explain Plaintiff's Exhibit No. 8? Is there anything in that magazine that to you is obscene? A. No, sir. [105]

Q. Will you examine Plaintiff's Exhibit No. 25? I will ask you the same question: Is there anything in that magazine that is obscene?

A. I see nothing obscene, sir.

Q. Now, Mrs. Sutherlin, you are a housewife,

(Testimony of Mrs. James Sutherlin.)

and you work, I believe, helping prepare the meals for the Chamber of Commerce, and that is the reason you asked for a delay in coming here?

A. Yes.

Q. And your husband is a railway mail clerk?

A. Correct, yes.

Q. Have you ever held any official position in the railway organization?

A. Yes. I am Vice President of the railway organization for two years.

Q. Does that organization bother you?

A. Not in my activities.

Q. Does that organization know that you are in the nudist movement? A. Yes.

Q. Do they criticize you or hold that against you?

A. They don't believe like I do—some of them, but they don't condemn me because of that.

Q. Do you believe that nudism is wholesome and healthful?

A. Yes. That is our motto, a healthy mind and a healthy body. We feel that the mind governs [106] everything.

Mr. Rowan: You may take the witness.

Cross-Examination

By Mr. Bantz:

Q. Mrs. Sutherlin, do you consider drinking bad? A. Yes, I do.

Q. Smoking, do you consider that bad?

(Testimony of Mrs. James Sutherlin.)

A. Well, I think it is bad for the individual——

Q. (Interposing): If you think it is all right, then is it all right?

A. If one knows something is all right, that doesn't make it right.

Q. In other words, you can, if you think nudism is right, that doesn't make it right; is that what you mean?

A. Oh, not particularly, but I think when people really know the true facts of nudism——

Q. I just asked you a question and will you answer the question, please? I don't care about the theory. What do you mean by obscene? What is your definition of obscene?

A. Well, I have been around people that were fully clothed that I thought was——

Q. (Interposing): In other words, you feel that it is obscene if you find a girl that had a very low V-cut and a tight dress, that might be obscene to you? A. Yes.

Q. But it is not obscene if she has clothes on? [107]

A. If she has them to draw attention.

Q. Don't you think it would draw more attention if she didn't have any clothes on?

A. No, but if I see a fellow on the beach who has a dark striped bathing suit on, it might create somebody's curiosity.

Q. But do you feel that it is not obscene to be naked?

A. No. God created our bodies in perfection.

(Testimony of Mrs. James Sutherlin.)

Q. You stated that you read these articles and you looked at these pictures in the books including the part that is in English?

A. You can look at them.

Q. You look at the pictures?

A. Yes, but I didn't read the ones that are in a foreign language.

Q. Tell me what you think obscene is as far as the sex organs are concerned. Do you think that sex organs, when you see merely a female organ, are obscene? A. No.

Q. If you had a picture of a man having intercourse with a girl, would that be obscene to you?

A. Oh, certainly.

Q. Now, there is a distinction when you see these organs that you see openly, that becomes obscene; is that correct? A. Yes.

Q. And drinking is obscene to you? [108]

A. Yes, because when you are drinking, you are not usually normal. I have seen men who were perfectly all right when they were sober, but when they were drinking they were not.

Q. Do you feel that these magazines——

May I have Plaintiff's Exhibit No. 26, Mr. Clerk?

(The clerk handing the exhibit to counsel.)

Q. Looking at the last page of Exhibit 26, which is the inside cover, you see a young girl standing there looking up in the air, and the pubic hair and the vagina can be seen. Do you feel that is a work of art? Is that what you mean?

(Testimony of Mrs. James Sutherlin.)

A. Yes. It all depends on what the mind makes obscene.

Mr. Bantz: That is all, your Honor.

Mr. Rowan: That is all, Mrs. Sutherlin. May she be excused?

Mr. Bantz: Yes.

The Court: You may be excused.

(The witness was excused.)

The Court: We will take a short recess.

(A short recess was taken.)

Mr. Bantz: Mr. Brumblay, will you be sworn, please?

ROBERT C. BRUMBLAY

was called as a witness on behalf of the Plaintiff, being first duly sworn, testified as follows: [109]

Direct Examination

By Mr. Bantz:

Q. Will you state your full name, please?

A. Robert C. Brumblay.

Q. Where do you live, Mr. Brumblay?

A. 2804 West Rockwell Avenue.

Q. Mr. Brumblay, I assume you are at least forty years of age? A. Yes, sir; I am.

Q. How long have you been in Spokane?

A. Well, I have been in Spokane five years this last period. Before I went to the State College, and as a boy up to six years.

Q. Now, Mr. Brumblay, you graduated from

(Testimony of Robert C. Brumblay.)

W. S. C.; is that correct? A. That is correct.

Q. After you graduated from school, what profession, if any, did you engage in?

A. I was a teacher and an athletic coach

Q. And you practiced that for how long?

A. Twenty-three years.

Q. How many? A. Twenty-three years.

Q. Just for the record here, you know me quite well, do you? A. Yes, I do.

Q. You have known me for a considerable number of years? A. Yes, I have, Mr. Bantz.

Q. I haven't talked to you about this matter at all? [110] A. No.

Q. Nor anybody in my office, concerning these magazines? A. No.

The Court: What are you doing?

The Witness: I am Chief Probation Officer, Spokane County, your Honor.

The Court: I think the record should show [illegible]

Q. (By Mr. Bantz): You later went to W. S. C. in an athletic directorship down there; is that correct? A. That is correct; yes, sir.

Q. And you have been here in Spokane since then? A. I have.

Q. Now, your job in Spokane is County Probation Officer?

A. Chief Probation Officer; yes, that is right.

Q. Do you handle the juvenile work? Is that your section, or just Probation Officer?

A. Yes. I am strictly Juvenile Probation Officer.

Q. That is your section? A. Yes.

(Testimony of Robert G. Brumblay.)

Q. Are you married? A. Yes.

Q. Do you have children? A. I do.

Q. And their ages? [111]

A. I have a daughter three and I have a son in college now. He is nineteen.

Q. Are you a nudist, Mr. Brumblay?

A. No, sir.

Q. Do you participate in the average activities of the community in general? I mean service clubs and that type of thing?

A. I have been. Yes, I am at the present time.

Q. And you are occasionally engaged in this—I know you are, in schools; is that correct?

A. That is correct.

Q. Do you feel that you have a broad education in the handling of young people?

A. Yes, sir; I do.

Q. And that is your job at the present time; is that correct? A. That is correct.

Q. I will ask you to take these magazines and take a few minutes and run through the magazines. If there is something there that you want to read, just take a moment and do that.

The Court: What is that number?

Mr. Bantz: That is Plaintiff's Exhibit No. 27, your Honor.

Q. (By Mr. Bantz): Mr. Brumblay, after having looked at those magazines such as you have there now, I will ask you a couple of questions with reference to the background, and I am assuming

(Testimony of Robert C. Brumblay.)

that you know what [112] the word "mores" means? A. Yes.

Q. And you have in your own mind—you know, at least, personally what the word means so far as you are concerned? A. Yes, sir.

Q. Do you have in your own mind an idea of what a personal opinion of the word "obscene" is?

A. I think I do; yes, sir.

Q. Now, dealing with the word "obscene," or whatever word you may want to use as a layman, having looked at these pictures, in your own mind, do you feel that they are obscene or not obscene?

A. I would say that some of them are rather sensuous, if I might use that term; but I don't see—I would say they are sensuous.

Q. Do you feel that maybe, taking a picture as in Plaintiff's Exhibit No. 25, the first page, with a man standing beside a woman there, does that picture in your opinion, strike you as being obscene or not obscene?

A. I would say that there is exposed—what is exposed is on the obscene side.

Q. As you understand it?

A. As I understand it with relation to children.

Q. I just want to have your personal opinion as to what you feel, Mr. Brumblay. I am not going to qualify you as an expert [113] on all of these particulars. In other words, you feel that when the organs are shown, such as the one I showed you, in your opinion, that is obscene. Would you mind

(Testimony of Robert C. Brumblay.)

looking at the picture in Plaintiff's Exhibit No. 26, the last page, just inside the cover and take a close look at that picture? Do you consider that picture showing the parts of the woman there obscene?

A. Yes, according to our sense of decency.

Q. Now, with all of these other pictures, I wish you would examine each one separately, and if they accord with what we have gone through in general, would you also say that they, too, would be obscene if they were comparable?

A. Yes, they are of a similar nature.

Q. And you are talking about your own feelings in the matter, personally, as a man and father and one who works with youngsters? A. Yes.

Q. Mr. Brumblay, what effect do you feel these pictures would have on high school children?

A. Well, speaking from a physiological aspect, we must realize that children are very impressionable up to the age of eighteen, as far as sex is concerned, and I don't think that they would be good for a youngster.

Q. Well, do you feel that, in your opinion, it would have a bad effect on the high school child?

A. Yes, I do. Certain desires must not be aroused at that age, anyway. [114]

Q. Do you handle delinquents in your office?

A. I certainly do.

Q. Would that statement be true also of a child of the age of fourteen to eighteen?

(Testimony of Robert C. Brumblay.)

A. Certainly some delinquents, yes. Certainly some. We handle various types of offenses.

Mr. Bantz: I believe you may cross-examine.

Cross-Examination

By Mr. Rowan:

Q. Mr. Brumblay, will you take Plaintiff's Exhibit No. 9 before you? Just read that two or three minutes, if you will, and turn to page 6. There is a particular editorial there. Will you read it, please, to yourself? A. Yes, I will.

Q. Do you find any word of obscenity in that language? A. No, not in the editorial itself.

Q. Will you turn to page 9 of Plaintiff's Exhibit 26, please? I don't care whether you read that or not. You get the general idea, do you?

A. Yes.

Q. Is there anything to indicate any obscenity in any way, shape, or form in that?

A. Not so far as the article is concerned.

Q. Now, in the article that you just read preceding this, do you recall that? [115] A. Yes.

Q. Now, do you know of any article in any of these magazines that the printed matter itself, you would consider to be obscene?

A. Not that I have read.

Q. And you know, of course, that there are pamphlets and magazines sold at news stands which are lascivious? A. For what, sir?

Q. To aggravate sex desires of people, and so on.

(Testimony of Robert C. Brumblay.)

They are not put out for the purpose of promoting any sincere belief that any group of people believe in it? You know that yourself? A. Yes.

Q. Now, I think if you and I would agree and Mr. Mounce would agree with us that these pictures that you have looked at and that you have picked up by themselves, and if you had them out selling they would be obscene, wouldn't they, most of them?

A. The majority, not all of them.

Q. If taken out by themselves?

A. Mr. Mounce, as I understand——

Q. Yes. However, if they are used for sole purpose of illustrating an article?

A. It shows a man and woman, certainly.

Q. Entirely in the nude, or maybe you have never seen that.

A. I know what you refer to, yes.

Q. Do you know of sex studies that are made by the P.T.A. [116] throughout the country and particularly in New Jersey where they required every child three years of age see its sisters and brothers and parents in the nude? Have you heard about that? A. No, I can't say that I did.

Q. Do you know that the State of New Jersey, or the Education Department of the State of New Jersey put out a pamphlet in its school curriculum under which it reproduced figures showing people in the nude—men and women?

A. I don't know.

Mr. Bantz: I will object to that, your Honor.

(Testimony of Robert C. Brumblay.)

The Court: He has said he doesn't know about it.

Mr. Rowan: I didn't assume that he did. No further questions of Mr. Brumblay.

Mr. Bantz: No further questions.

The Court: You may be excused, Mr. Brumblay.

(The witness was excused.)

MERVIN MOUNCE

having been previously sworn, was recalled by the Defendant and testified further as follows:

Direct Examination

By Mr. Rowan:

Q. Do you know of your own studies in your own work in the nudist movement, whether curiosity is one of the greatest dangers [117] of growing-up children, about the body?

A. Well, it is a natural curiosity, and children want to know all they possibly can what the opposite sex looks like.

Q. And does that showing satisfy them, or does it fulfill or aggravate that curiosity?

A. That satisfies any curiosity that there might be. Children are very eager, and one of the questions often asked about nudism is whether a man will be visibly embarrassed, and that is absolutely not so. The mechanism that controls these things is automatically aware that a nudist camp is not the time nor the place for sexual activity.

(Testimony of Mervin Mounce.)

Mr. Bantz: Your Honor, I will object to that. He is not answering the question.

Q. (By Mr. Rowan): One more question, Mr. Mounce. Do you know of various pamphlets, periodicals, and papers that are sold in newsstands everywhere all the time that you refuse to handle because they do not promote the nudist movement?

A. We have one man that offered to send a copy of a magazine called the—I forget the name of it—and they put out photographs in it that were all about sex, and even things that I would not want to describe in front of a man or a woman, and we write back and tell them, "No, we are not interested in the handling of that kind of material."

Q. Do you know of others? [118]

A. There are all kinds of them sold by the millions of copies that we would not touch.

Q. Can you name some of them, the type?

A. Well, we call them "girlie" magazines. They are devoted to sex and exorbitant display and emphasis of secondary sex characteristics, with women in outlandish positions, and suggestive jokes. We would not handle that type of material at all.

Q. Why not?

A. Well, it is exactly the opposite of what we believe, as though the human body is something to laugh at—something that is obscene. We don't think the human body is obscene.

Mr. Rowan: That is all.

(Testimony of Mervin Mounce.)

Cross-Examination

By Mr. Bantz:

Q. What is your definition of obscene?

A. Obscenity is strictly suggestive and can exist only in the mind of the viewe . Nothing in itself can be obscene.

Q. Are you against drinking?

A. I am against drunkenness.

Q. Are you against smoking? A. I smoke.

Q. Is it obscene to take a social drink?

A. Oh, no.

Q. You don't approve of it?

A. Oh, I don't think a man should do anything to excess. [119]

Q. Let me ask you this question, Mr. Mounce: If nudism, as you testify, is not obscene to you, where does the use of the male and female organs become obscene to you?

The Court: Did he understand the question?

The Witness: I don't understand the question.

Mr. Rowan: The word "use."

Q. (By Mr. Bantz): Is it obscene? I will get right down to it. Is it obscene to you if another man turns out and has an erection, is that obscene?

A. Well, it is probably in bad taste. Where is it taking place?

Q. If it is in a nudist camp?

A. That would be in bad taste.

(Testimony of Mervin Mounce.)

The Court: That is what I was thinking; it would be in bad taste.

A. I don't know that it would be obscene. In the sixteen years that I have been engaged in the nudist movement, I have never seen such a thing happen. I did hear of it happening one time and the man was asked to leave the camp, and he did leave at once.

Q. One of the ladies here testified that the children out there are kept together and they teach them that they do not allow any obscene things going on. What do you have to say about that? If that is the situation, why do you worry about that? [120]

A. Mr. Bantz, you must understand that nudism is a minority movement, and as such we are very much liable to criticism, and that is the reason why we make certain specifications that might not otherwise be necessary, and we have to lean backwards to avoid the very appearance of evil. There might be a newspaper man around, and we don't want him to get the wrong impression.

Q. Nudists have the same desires that the rest of us have, but only at times when you are not in a nudist camp; that is, between husband and wife in private?

A. Well, that is quite true; it is quite true.

Mr. Bantz: That is all. Thank you.

(The witness was excused.)

Mr. Rowan: That is all unless the Court has some questions.

The Court: No, I haven't any questions.

Mr. Rowan: We rest.

(The Defendant rested.)

Mr. Bantz: Your Honor, I have no other questions.

(Counsel for both sides argued the case to the court.)

(Whereupon, at 4:25 o'clock p.m., September 27th, 1955, the trial was concluded.) [121]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Ernest E. Getchel, do hereby certify:

That on the 27th day of September, 1955, I was the duly appointed, acting Official Court Reporter of the District Court of the United States of America, in and for the Eastern District of Washington; that as such reporter I reported the foregoing proceedings before the Honorable Sam M. Driver, Judge of the said court, held on the 27th day of September, 1955, at Spokane, Washington, and that the same was transcribed on the typewriter under my supervision and direction, and that the said typewritten transcript, consisting of pages one (1) to one hundred eleven (111), contains a full,

true and correct transcript of the proceedings had on said date.

Dated at Spokane, Washington, this 19th day of January, 1956.

/s/ ERNEST E. GETCHELL,
Official Reporter.

[Endorsed]: Filed February 17th, 1956. [122]

United States District Court, Eastern District of Washington, Northern Division

Civil No. 1286

UNITED STATES OF AMERICA,

Libelant,

vs.

100 copies INTERNATIONAL JOURNAL, No. 6, et al.,

Claimant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered, that the above-entitled cause came on before the Honorable Sam M. Driver, Judge of the above-entitled Court, at Spokane, Washington, on December 30, 1955, at 10:00 o'clock a.m., for the taking of additional testimony; the Libelant being represented by William M. Tugman, Assistant United States Attorney for the Eastern District of Washington, the Claimant being represented by his attorney, C. C. Rowan, whereupon, the following proceedings were had, to wit:

The Court: We are going to have some more testimony in this case, I understand, this morning.

I was just remarking to Mr. Taylor, if I should change my mind and decide the case against you, then I feel I should have a third hearing and let you come in again.

Mr. Tugman: Well, there would be some merit to that, your Honor. We can't dig up any different magazines, though. [124]

The Court: All right.

Mr. Tugman: If the Court please, counsel for the government and counsel for the claimant have stipulated that the case may be reopened for the taking of a little bit of additional testimony. The reason for that was that, as your Honor will recall, there were twenty-seven exhibits introduced in this case. The original action as filed did not include all of the twenty-seven exhibits, but only included a portion of them. The government wanted to amend the pleadings to conform to the proof so that all twenty-seven exhibits would be in. Mr. Rowan asked, and the government consented to his request, that additional testimony be taken in this matter. I have the written stipulation, but it is not quite out of my office.

Mr. Rowan: That is agreeable, if the Court please.

The Court: Yes, all right. Do I understand this correctly, that some of the magazines that were put in evidence in the former trial were not covered by your libel?

Mr. Tugman: That is correct, your Honor.

Mr. Rowan: Sixteen of them.

The Court: Oh, is that so?

Mr. Rowan: A large number. Your Honor found one, but there were fifteen more.

The Court: Oh, I see.

Mr. Tugman: They were all actually seized. [125]

The Court: Yes, all right.

Mr. Rowan: If the Court please, we wanted to get them all combined into one case and not have a second trial.

Mr. Tugman: And to save time, too, your Honor, I would like to interpose an objection at this time to the admissibility and competency of any testimony that Mr. Rowan might introduce. I am not questioning his right to introduce it.

The Court: I see. The record may show that then without your repeating it each time.

Mr. Tugman: Yes.

The Court: You may proceed then when you are ready.

Mr. Rowan: Call Mr. Feuersinger.

MICHL FEUERSINGER

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. Just be seated, Mr. Feuersinger. State your name, age and business.

A. Michl Feuersinger, and I am in the building material business.

(Testimony of Michl Feuersinger.)

Q. Building material. Your age?

A. Forty-six. [126]

Q. Are you a citizen of the United States?

A. Yes.

Q. Naturalized? A. Yes.

Q. Do you read German? A. Yes.

Q. Are you a member of any sunbathing association commonly known as nudist organizations?

A. No.

Q. How long have you been in this country?

A. Eighteen years.

Q. I hand you plaintiff's Exhibit No. 6 and ask you to look at that, Mr. Feuersinger. Is that printed in German or partly in German, the reading material?

A. This is English and this is Holland (indicating).

Q. That is what? A. Hollandisl. Dutch.

The Court: Dutch.

Q. (By Mr. Rowan): Dutch. Can you read that?

A Well, I can. I understand it, but I don't think I would be able to pronounce it correctly.

Q. Well, all right. Assuming that there is nothing in the printed word that is dirty, filthy, or obscene, is, in your opinion, the magazine obscene?

A. You mean the pictures? [127]

Q. Is the magazine obscene?

A. Not that I can see anything obscene about.

Q. I hand you Plaintiff's Exhibit 23 and ask you if that is printed in German?

(Testimony of Michl Feuersinger.)

A. This is German (indicating).

Q. Turn to the inside. A. This is German.

Q. Can you read that in German? A. Yes.

Q. Will you tell us in English what the first paragraph concerns? Don't go into detail.

A. I want to read it first.

Q. O.K., look at it.

Mr. Tugman: If the Court please, we might save a little time. There is no contention that the printed matter in here is obscene.

Mr. Rowan: All right.

The Court: Yes, I don't think it is, Mr. Rowan.

Q. (By Mr. Rowan): All right, Mr. Feuersinger, assuming that the printed material in that magazine is not filthy or dirty or obscene, but is for the sole purpose of promoting nudism, in your opinion, is that magazine obscene?

Mr. Rowan: If the Court please, I tried to get the witnesses this morning to go over this and save time, but I [128] couldn't. I was so busy yesterday.

The Court: Yes.

A. No, not for me.

Q. (By Mr. Rowan): Does that offend your decency in any way? A. No.

The Court: What Exhibit number is that?

The Clerk: That is number 23, your Honor.

The Court: 23. May I see it?

(Exhibit handed to Court.)

Q. (By Mr. Rowan): I hand you Plaintiff's

(Testimony of Michl Feuersinger.)

Exhibit Number 7 and will ask you the same question, is that magazine obscene?

A. Since it is for the promotion of nudism, it cannot be obscene.

Mr. Rowan: That is all. You may take the witness.

Cross-Examination

By Mr. Tugman:

Q. What was that last statement you made? I didn't get it.

The Court: Will the reporter read it?

(The answer was read.)

Q. (By Mr. Tugman): I see. Were you originally a native of Germany? A. Austria.

Q. Autria, I see. This type of publication is pretty [129] common over there, isn't it?

A. Yes.

Q. I see. You don't see this type of publication very often here, do you, on the newsstands, and so on, not as often?

A. Well, actually, I never paid much attention to it.

Q. Do you read these things yourself?

A. Beg your pardon?

Q. Do you subscribe to these things yourself?

A. No, I don't.

Q. Do you have any children? A. Two.

Q. How old are they?

(Testimony of Michl Feuersinger.)

A. I have a son who is nine and a girl who is seven and a half.

Q. I see. Well, I will ask you, is this the type of thing that you would bring to your home to your son and daughter?

Mr. Rowan: What Exhibit, Mr. Tugman?

Mr. Tugman: That is Exhibit Number 6.

Q. (By Mr. Tugman): Would you take that home from this courtroom, if we gave you a copy of that Exhibit No. 6, and proudly show it to your son and daughter as educational?

A. Well, I imagine if I would be a nudist. [130]

Q. No, you are not a nudist, you testified that you are not.

A. I don't think I see anything wrong about——

Q. I said, would you take it home to them? Would you like them to have it?

Mr. Rowan: I object to that as immaterial. He says he doesn't see anything wrong with it.

The Court: Well, I think it is immaterial. The standard to be applied is not children, it is the average adult individual.

Mr. Tugman: I take it the objection is sustained, then, your Honor?

The Court: Yes, that's right.

Mr. Tugman: I have no further questions.

Mr. Rowan: That is all, unless the Court has questions.

The Court: No, I have no questions.

(Witness excused.)

Mr. Rowan: Mr. Barnett.

ARLIE BARNETT

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Mr. Rowan: If the Court please, and counsel for the government, the witnesses have asked me if they could be excused after they are called, to go back to work. [131]

Mr. Tugman: No objection.

The Court: I asume there is no objection to that. You may be excused, Mr. Feuersinger, and any other witness who testifies here, unless counsel indicate that they want you to remain, will be excused as soon as they get through testifying.

Direct Examination

By Mr. Rowan:

Q. Your name is Arlie Barnett?

A. That is right.

Q. What is your occupation, Mr. Barnett?

A. Salesman and owner of Glass Heat.

Q. Glass Heat here in Spokane?

A. In Spokane.

Q. How long have you lived here?

A. Practically all my life. 57.

Q. Are you a family man? A. Yes, sir.

Q. You are president of your company, I believe? A. That's right.

Q. Glass Heat Company. Are you a member of any sunbathing association? A. I am not.

(Testimony of Arlie Barnett.)

Q. I call your attention to the Plaintiff's Exhibit 6, Mr. Barnett, and will ask you to state whether, if the reading [132] material is clean in that magazine, whether the magazine is obscene or is indecent, in your opinion?

A. I see nothing wrong with it.

Q. The same question as to Exhibit 7?

Mr. Rowan: If the Court please, I am not going to go through many of them, I just want to take a few typical ones.

The Court: All right.

A. I see nothing wrong with that in that, either.

Q. (By Mr. Rowan): And the same question as to Exhibit 8? A. No, I do not.

Mr. Rowan: You may take the witness.

Cross-Examination

By Mr. Tugman:

Q. Are you married? A. Beg pardon?

Q. Are you married? A. Yes, sir.

Q. Have you ever seen these magazines before?

A. Yes, I have.

Q. Where did you see—— A. Part of them.

Q. Pardon?

A. I didn't see just exactly these ones but some similar to [133] them.

Q. Where did you see them?

A. I can't hear, I am a little hard of hearing.

Q. Where did you see them?

A. Well, I have some in my own home.

(Testimony of Arlie Barnett.)

Q. You have some in your own home?

A. I do, yes, sir.

Q. What purpose do you buy them for?

A. That I wouldn't know.

Q. You wouldn't know?

A. See why and what the side of the nudist colony is, yes, sir.

Q. You buy them for that purpose?

A. That's right?

Q. Are you a nudist? A. I am not.

Q. Well, have you ever joined nudist colonies or anything? A. No, sir.

Q. Pardon? A. No, sir, I haven't.

Q. Then you just buy them for the purpose of looking at them to see what the nudists do, is that right?

A. If you don't know what the other side is doing, how can you criticize them?

Q. Well, you know what the naked body is, don't you? I [134] mean you know what a human being looks like undressed, don't you?

A. That's right, yes.

Q. Well, do you need these magazines to show you that? Let me show you Plaintiff's Exhibit 8, show you this picture here. What relation does that picture have to nudism or nudist movements?

A. Well, I would say they were posing.

Q. Posing what? What part is showing up mostly? A. All their parts.

Q. All their parts? Where is their face?

A. Except their feet, everything.

(Testimony of Arlie Barnett.)

Q. Except their what? Where is their face?

A. Well, she has that covered up.

Q. What is the first thing your attention is directed to there? A. Well, her body, of course.

Q. What part of her body?

A. Well, her breasts or buttals.

Q. Her breasts and her pubic area, isn't that right? A. That's right.

Q. In other words, you think the function of nudism is to direct your attention to breasts and the pubic area, is that right? A. Yes, sir. [135]

Q. That is the function?

Mr. Tugman: No more questions.

Redirect Examination

By Mr. Rowan:

Q. Do you think, Mr. Barnett, that the exhibition of all parts of the human body destroys the curiosity that causes difficulty among many families?

A. No.

Mr. Rowan: That is all.

(Witness excused.)

Call Mr. Latton.

LELAND LATTON

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. State your name, please.

A. Leland Latton.

(Testimony of Leland Latton.)

Q. How old are you, Mr. Latton?

A. Forty-eight.

Q. You live here in Spokane? A. Yes.

Q. How long have you lived here? [136]

A. Ten years.

Q. What is your business?

A. I am in the amusement business.

Q. What type of amusement?

A. Well, we call it Kiddieland.

Q. You operate a merry-go-round, I believe?

A. That's right.

Q. Or something to that effect. Are you a member of any sunbathing association commonly called nudist organizations? A. No.

Q. I hand you Exhibit Number 6, Plaintiff's Exhibit 6, and ask you to look at that, and assuming that there is nothing obscene in the written material, is that magazine obscene, in your opinion?

A. No, not for the purpose that it is meant.

Q. Do you know what purpose it is meant for?

A. Well, it is put out for nudism, I imagine.

Q. Calling your attention to Plaintiff's Exhibit 7, I will ask you the same question?

A. No, it is all the same.

Q. And would you say the same with regard to Plaintiff's Exhibit 8? A. Yes.

Mr. Rowan: You may take the witness. [137]

(Testimony of Leland Latton.)

Cross-Examination

By Mr. Tugman:

Q. You say you operate merry-go-rounds and that type of thing? A. Yes.

Q. Well, if I gave you these magazines to put on a stand so children visiting your merry-go-round could look at them while they weren't riding, would you take them?

A. Oh, I don't—I didn't ever know of nudist magazines being put out for that purpose.

Q. Would you take these particular magazines and put them in your amusement park for the general public to read?

Mr. Rowan: Object to that as improper cross-examination and there is nothing, as I view it, if the Court please, in the pleadings that warrants any question of that type.

The Court: I will overrule the objection. He may answer that.

Q. (By Mr. Tugman): Would you take these magazines and put them in your amusement park for the general public to read the same as you would Life or Time or Saturday Evening Post or something like that?

A. Well, if they were put out to be put out to the public on any stand, I think they would be——

Q. That is not what I am asking. I am asking, would you put [138] them out in your park for your customers to look at?

(Testimony of Leland Latton.)

A. Well, they could be put there, yes, if they were for that sole purpose.

Q. That is not what I am asking. Would you take these and put them in your park?

A. Well, I suppose we would if they were called for, yes.

Q. Would you take them right now if I just gave them to you, assuming your park is open and I imagine it is closed for the winter, would you just take these things and put them out for general distribution, put a copy on the merry-go-round, a copy in the little cars, a copy on the ferris wheel on every seat so people could read them?

The Court: Pardon me, I think the question may put the witness in a rather difficult position. I think the question would have to assume that he could lawfully put them there, and the court has held that these magazines are not proper to be circulated. Of course, he wouldn't want to go out in the face of the Court's ruling and put them in, but the question should assume it is lawful and legal to do it.

A. If it was lawful and legal to do it, yes.

Q. (By Mr. Tugman): If it were lawful and legal to do it, you would? In other words, if the City Council or the Congress or something were to pass a law that these things were perfectly legal, would you just take these out and hand them out to your customers as they came [139] into the park?

A. Well, there would have to be a fee for it, I imagine. I just wouldn't——

Q. Well, I mean fee or not?

(Testimony of Leland Latton.)

A. If it was lawful, yes.

Q. If it was lawful, yes? You would see no objection to it. I am showing you Exhibit No. 8, that particular picture there (indicating), what is your opinion of a picture like that?

A. Well, I suppose it is to encourage nudism.

Q. What does it mean to you as a person? What do you see in that?

A. It is a picture of the human body.

Q. What do you see about the human body in that picture?

A. Well, the body, everything except the face.

Q. Everything except the face. The face isn't important. What are the things that are emphasized in that picture to you?

A. Oh, the breasts and the other—lower part of the body.

Q. Well, do you think it is perfectly all right to just emphasize those features alone, then, is that right?

A. Well, if anybody believes that way, yes, I would say so.

Q. Believes what way?

A. Believes in nudism.

Q. Well, what is nudism. Is it a cult that believes in [140] breasts and pubic areas?

A. I don't know, I never was a nudist.

Q. You don't know what nudism is, then?

A. No, I haven't gone into it that deep.

Q. What does this picture represent to you?

A. It represents a leg.

(Testimony of Leland Latton.)

Q. A leg and what else? That is Exhibit No. 7.

A. Well, it is a leg.

Q. A leg and the pubic area, isn't it?

A. Well, if you want to examine the picture, yes. I suppose most of that would be imagination.

Q. Would that encourage you to join the nudist movement, just that leg and that pubic area?

A. Well, I haven't ever thought of joining the nudists just from looking at a picture or anything like that.

Q. I mean, do you think that is the type of thing that ought to be waved around in public?

A. I have never seen them out in public.

Q. Well, do you think that they should be distributed to people at large, in your opinion? The public at large? I am speaking of people who aren't nudists, I am speaking of the whole public, high school boys and girls, college boys and girls, the man and woman on the street. Do you think this type of thing is the thing that ought to be distributed around to the public as a whole, just should [141] be broadcast all over, this type of thing right here that is in Exhibit 6, I believe, or 8? Do you think that should go out everywhere, this type of thing that is in Exhibit 6? Do you want that to be distributed generally to all segments of the public?

A. Well, I don't think it would be exhibited to the public, because my idea of nudists, they have always—none of this——

Q. I am not speaking of nudists. Do you think that ought to be exhibited to the public as a whole?

(Testimony of Leland Latton.)

A. Well, no, I don't think it ought to be out free.

Mr. Tugman: No further questions.

The Court: Any other questions?

Mr. Rowan: You say no further questions?

Mr. Tugman: That's right.

Redirect Examination

By Mr. Rowan:

Q. Do you see any objection to distributing any of those to people who want to see them?

A. No, I don't.

Mr. Rowan: That is all.

The Court: That is all.

(Witness excused.)

Mr. Rowan: Call Mr. Fearon. [142]

JOHN FEARON

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. Your name is John Fearon?

A. Yes, sir.

Q. You live here in Spokane? A. I do.

Q. Are you connected with the City Health Department of the City of Spokane? A. I am.

Q. How long have you lived in Spokane, Mr. Fearon? A. Forty-three years.

(Testimony of John Fearon.)

Q. You are a citizen of the United States?

A. I am.

Q. Are you a member of any sunbathing association commonly known as nudists?

A. None whatsoever.

Q. I hand you the Plaintiff's Exhibit 8 and ask you to state whether if nothing in the written language in that magazine is dirty or obscene, in your opinion, the magazine as such is obscene?

A. In my opinion, it is not obscene.

Q. I ask you the same question with regard to Plaintiff's [143] Exhibit 7?

A. The same is true.

Q. And Plaintiff's Exhibit 6?

A. And 6, also.

Q. And Plaintiff's Exhibit 24? A. Also 24.

Q. You have never seen me or talked to me until just a few minutes ago, have you? A. No.

Q. Not even talked to Mr. Mounce until this morning?

A. I talked to one gentleman on the phone. I can't recall his name.

The Court: Let's see 24.

(Exhibit 24 handed to the Court.)

Mr. Rowan: Take the witness.

Cross-Examination

By Mr. Tugman:

Q. What is the meaning of the word "obscene"?

A. Well, indecent, unfit, pertaining to filth of

(Testimony of John Pearon.)

mind, indicating vice, common periodicals that suggest murder and indecency.

Q. Pardon?

A. Violation of maybe the Ten Commandments.

Q. Do you think that something would be obscene that might [144] incite lust?

A. If that point were proved, yes.

Q. If that point were what?

A. Were proved, that it did incite lust.

Q. Well, do you think the female figure ever excites any kind of lust or desire in man?

A. Not to me, it doesn't.

Q. It doesn't excite anything to you at all?

A. It incites beauty.

Q. It incites beauty. The female figure, as such, never arouses you one bit?

A. Oh, I am aroused, but I feel also that I am a Christian and I respect my neighbor's wife and children, also.

Q. Well, that is fine, but the female form to you is a thing of beauty? A. That is correct, yes.

Q. And it doesn't create any desires in you at all?

A. Only a natural desire as God so made it innate in us.

Q. Well, do you think the female figure in any form being pictured is fine?

A. I think either as a nude or fully clothed.

Q. Well, I mean does it make any difference to you what features of the nude?

A. One part of the human body is as precious as the other parts and as beautiful. [145]

(Testimony of John Fearon.)

Q. Do you think any emphasis should be had on any one part or the other?

A. No, I don't, I don't think so. Especially, that depends on the position and the act of muscular activity involved in the pose in the picture.

Q. Well, you have no objection to a photograph of a face, I assume? A. No.

Q. Or of the hands or of the feet? A. No.

Q. Do you have any objection to any photograph just showing the breasts alone?

A. No, they are beautiful also.

Q. And you have no objection to a photograph that emphasizes the pubic region?

A. I would have to see the one in question.

Q. Well, I mean do you think the human body should be emphasized as a whole or just in part?

A. Well, as a whole, in its entirety, it performs a given task. In all its beauty, I would suggest the entire figure, being an artist.

Q. You are an artist? A. Yes.

Q. Oh, then, you look at pictures as an artist, I mean you look at them in form, I mean you look at things for the [146] beauty that they have?

A. Well, I am also a business man and I try to look at it impartially from both sides.

Q. I mean as an artist, I imagine that you have had occasion to use live models, and so on?

A. Well, mostly still models and from photographs.

Q. In other words, it would be necessary for you to study the form and contours of the human so

(Testimony of John Fearon.)

that you could accurately portray what you were sketching?

A. That's right. I feel the same is true in real life.

Q. Well, it is the context in which a person looks at it, then, isn't it? A. Yes.

Q. Well, I show you this picture here, this Exhibit No. 8. What does that picture represent to you?

A. Well, a woman's hair is her crown of glory. The way the space is broken, the elbows pointing and the curvature of the body and every part of the body, the navel, the breasts, you might make a flower vase the same way. You see figurines similar and there is so much about it of the curves in the arms and the way the fingers are posed in the hair in a kneeling position and the fact that we wonder if she has her head turned, there are so many questions to ask about it, rather than to lower one's self to the vulgar in this picture. [147]

Q. Well, I think it is nice to get the artist's point of view in here.

Mr. Tugman: I have no further questions.

Mr. Rowan: That is all.

(Witness excused.)

Mr. Halverson.

GYLE HALVERSON

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. State your name, please.

A. Gyle Halverson.

Q. Mr. Halverson, how old are you, first?

A. Thirty-three.

Q. And are you a family man?

A. Yes, sir.

Q. You live here in town? A. Yes, sir.

Q. How long have you lived here?

A. About five years.

Q. You are one of the partners of the Elgin Soft Water Company here in Spokane, aren't you?

A. Yes, sir. [148]

Q. Do you have children? A. Yes, three.

Q. How old are they?

A. Six, five, three, and we are expecting the fourth in March.

Q. Are you a member of any sun bathing association commonly known as a nudist colony?

A. No, sir.

Q. Calling your attention to the Plaintiff's Exhibit numbered 26, Mr. Halverson, I will ask you to state whether, assuming that the printed material in that magazine contains nothing that is dirty or obscene, in your opinion, the magazine is obscene? A. No, in my opinion, it isn't.

(Testimony of Gyle Halverson.)

Q. The same question with regard to the exhibit numbered 16?

A. No, I can see nothing obscene about it.

Q. And the same question with regard to Exhibit 17? A. No.

Q. And Exhibit numbered 13? A. No.

Mr. Rowan: You may take the witness.

Mr. Tugman: I have no questions.

Mr. Rowan: That is all, Mr. Halverson.

(Witness excused.)

Is Mr. Jones here, Lee Jones? No. Mr. [149] Gehrke.

ARNOLD GEHRKE

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. Your name, please?

A. Arnold Gehrke.

Q. How old are you, Mr. Gehrke?

A. Forty-two.

Q. Are you a family man? A. Yes, sir.

Q. Children? A. Four.

Q. And how long have you lived here in Spokane? A. About nine months now.

Q. What is your official position or occupation at this time?

A. I am sanitation inspector for West Disinfecting Company.

(Testimony of Arnold Gehrke.)

Q. Are you a member of any sun bathing association commonly known as a nudist camp?

A. No, sir.

Q. I call your attention to Plaintiff's Exhibit numbered 9 and ask you, assuming the printed material has no dirty or filthy or obscene matter, is that magazine, in your opinion, obscene?

A. No, sir, it is not. [150]

Q. And the same question with regard to Plaintiff's Exhibit 14?

A. I can't read the language, but as far as—pardon me, I want to say this correct, say what I really mean. But if there is nothing in the printing, as far as it is concerned, there is nothing obscene in it.

Q. I see. And the same question with regard to Exhibit 19? A. Give the same answer.

Mr. Rowan: If the Court please, the last two exhibits, I believe we have had the English translation made of them and they accompany the exhibit.

The Court: I see, all right.

Q. (By Mr. Rowan): The same question with regard to Exhibit 25?

A. No, there is nothing obscene in there.

Mr. Rowan: That is all, you may take the witness.

Cross-Examination

By Mr. Tugman:

Q. What does "obscene" mean to you?

A. Obscene is that which you take to incite to murder or that which is filthy.

(Testimony of Arnold Gehrke.)

Q. Well, are there any other crimes than murder? A. Yes, there is.

Q. Rape or incest or anything like that? [151]

A. They are, absolutely.

Q. Adultery, that type of thing, that would be?

A. I didn't quite get the question?

Q. I say, adultery and that type of thing?

A. A crime, yes, sir.

Q. So that obscene would be anything that might incite people to that type of thing?

A. That is right.

Q. I assume that you regard yourself as a normal, sound individual, do you not?

A. Yes, sir.

Q. Have you ever met anybody who is not quite right mentally or a little bit weak or anything like that? A. I think we all have.

Q. Ever read in the newspapers of sex crimes or anything like that? A. Yes.

Q. Now you said that none of this is obscene, I will show you Plaintiff's Exhibit 26 and ask you what the purpose of the particular picture I am showing you there would be, in your opinion? What does it say? A. Yes.

Q. Will you read it? A. I can't read this.

Q. All right, you are just stuck with the picture, aren't [152] you?

A. Well, I wouldn't have it in the house because I can't read it.

Q. Yo wouldn't have it in the house?

A. Because I can't read it.

(Testimony of Arnold Gehrke.)

Q. Because you can't read it. Well, I mean——

A. You are asking—putting me on the point and that is what I say.

Q. You wouldn't have it in the house because you couldn't read it?

A. No, here it is, as far as the magazine is concerned, I have no need to have it in the house, but——

Q. Why don't you have a need then?

A. Well, because I don't read it.

Q. Well, I mean the pictures are there, wouldn't you just want to leaf through the pictures and look at them from time to time?

Mr. Rowan: Object to that as immaterial. The courts have said a number of times that the picture by itself is not the criterion.

The Court: Well, I think counsel has in mind another point here. You can't read the language, the picture is all you would see.

A. Well, as far as the picture is concerned, I don't see anything wrong with it. [153]

Q. (By Mr. Tugman): That isn't what I asked you. Would you like to have that thing in your house so you could just sit down of an evening and look through it with your wife? A. Yes.

Q. And your children? A. Yes.

Q. All right, what does that picture mean to you there?

A. That is a very active picture and healthy looking picture to me.

Q. A very active picture and healthy picture?

(Testimony of Arnold Gehrke.)

A. Uh-hûh.

Q. Is it the type of thing you would want around?

A. I can't see anything wrong with it.

Q. Well, what part of that girl's body is emphasized?

A. Well, I can't actually say it is really emphasized upon any point except activity.

Q. Well, do you think there is anything wrong in emphasizing the pubic area?

A. Can I answer that fully, sir?

Q. Yes.

A. I will say that there is less in that than what I have seen on the newsstands many times, these partially covered bodies.

Q. Well, do you see anything wrong with that picture there? A. No, I don't, sir. [154]

Q. You see nothing wrong, then, with a picture that exposes the lips of the vagina?

A. No, I have seen those many times.

Q. You have? A. Medical magazines.

Q. Do you think they ought to be put out to the general public?

A. Lay in doctors' office where youngsters are in.

Q. Have you ever seen that magazine in doctors' office or——

A. No, I have seen drawings and pictures in doctors' offices.

Q. Do you think they ought to be put out to the general public?

A. I don't see any reason why they couldn't be.

(Testimony of Arnold Gehrke.)

Q. Do you want those pictures out where every high school boy and girl can read them?

A. I believe it would stop a lot of crimes.

Q. You think it would stop a lot of crimes?

A. Absolutely.

Q. Your theory is very interesting.

The Court: May I see the one the witness was looking at?

(The exhibit was handed to the Court.)

Q. (By Mr. Tugman): Do you think that these, then, should be spread around in the high schools, and so on, so that children could learn about the human body? [155]

A. Well, according to what I read in the paper several times recently, I would say it would be a good thing.

Q. You think there would be nothing wrong with that at all?

A. No, because it would kill a lot of curiosity.

Q. A lot of what?

A. A lot of this curiosity that these youngsters have.

Q. Well, would you take these things home for your youngsters?

A. I have photography magazines at home.

Q. Would you take those right there?

A. I haven't got those magazines. The first I have seen of these magazines you have laid in front of me has been today.

(Testimony of Arnold Gehrke.)

Q. Just looking at that representative assortment there?

A. Well, I can say that my youngsters would not pay any attention whatsoever beyond looking at them and they would take and lay them down and think nothing more of it. I know my youngsters would not take them because I believe in wholesomeness in the family.

Q. Well, that is fine, but no doubt your youngsters are wholesome and they are a wholesome Christian family.

Now, in your opinion, do you think those should come into a family that is not Christian and wholesome and doesn't follow the precepts of the Bible and is a little bit weak-minded?

A. Those weak-minded ones would be more likely, I believe, [156] to be led to incest. That is the word, I believe, you want me to bring out.

Q. All right——

A. And crimes like that by partially dressed people flaunting themselves than they would from an actual person walking naturally.

Q. All right, now, in our high schools we have a cross-section of the whole community, do we not?

A. Very much so.

Q. All right, we are going to find bright children and dull children and moral children and immoral children there probably, aren't we?

A. That's right.

Q. All right, do you think this type of thing

(Testimony of Arnold Gehrke.)

should go around to people who are in high schools and the public as a whole?

A. Well, I don't know what the argument actually is, what the point is, on these magazines, whether they have ever been offered for that use,

Q. Answer the question.

A. All right, if the testimony—I am trying to answer it, like to get a little more on this. And as far as a youngster is concerned, from what I have seen the youngsters picking up these magazines, I have noticed that a complete nude in a photography magazine, the kids [157] will look at it and turn away from it to something that will draw their attention much more. So there I will answer this here would actually would take and stop a lot of this here trouble which we have, peeping Toms and what have you.

Q. Do you think this material should be shown down on skid row?

A. I don't know enough about skid row to answer your question, sir.

Q. Do you think it should be shown to persons of weak minds, tendency toward——

A. Your weak-minded person, if the tendency is that way, will be already working along that——

Q. Do you think this should be down with the stuff on the newsstands?

A. If this would be common tomorrow, sir, that would be the end of it.

Q. Do you think——

A. It is what is hidden and what we try to hide

(Testimony of Arnold Gehrke.)

and what we try to make illegal that people go for, not what they can see.

Q. Then it is your answer that we should publish, instead of less, we should publish this material by the millions of copies?

A. I would say that it would do good. [158]

Q. Would do good?

A. Because it would kill so much of this here curiosity, that is being built up.

Q. All right, then, you say it would kill all the curiosity that is being built up, is it your opinion then that we should publish diagrams and pictures of ultimate acts?

A. No, because that is going into an entirely different thing.

Q. Well, you say your opinion is it would satisfy curiosity. A. Visual curiosity, should I say.

Q. Visual curiosity.

Mr. Tugman: Well, I have no further questions.

The Court: Any other questions?

Mr. Rowan: No, that is all. Just have one more witness.

(Witness excused.)

The Court: All right. I assume it is understood that this testimony and evidence is to be considered along with the evidence——

Mr. Rowan: At the other trial.

The Court: ——at the other trial?

Mr. Rowan: The stipulation covers that.

The Court: I see, all right.

Mr. Rowan: Mr. Close. [159]

RALPH M. CLOSE

called and sworn as a witness on behalf of the claimant, was examined and testified as follows:

Direct Examination

By Mr. Rowan:

Q. State your name, please.

A. Ralph M. Close.

Q. How old are you, Mr. Close?

A. Seventy-eight.

Q. Where do you live?

A. 4229 Northwest Boulevard.

Q. Spokane, Washington? A. Yes.

Q. How long have you lived here?

A. Beg your pardon?

Q. How long have you lived here?

A. Oh, about fifty-one years.

Q. What is your occupation?

A. Customs broker.

Q. Are you a member of any sunbathing association commonly called nudist groups?

A. No, sir.

Q. Are you a family man? A. Yes, sir.

Q. Children? [160] A. Yes, sir.

Q. Children all grown, I suppose? Are your children all grown, Mr. Close? A. Yes, they are.

Q. I hand you Plaintiff's Exhibit numbered 10 and ask you to state whether or not, assuming all the printed material is clean, in your opinion, that magazine is obscene?

A. I don't consider it so.

(Testimony of Ralph M. Close.)

Q. The same question as to Exhibit numbered 12, Plaintiff's Exhibit 12? A. No.

Q. The same question as to Plaintiff's Exhibit No. 15? A. No, sir.

Q. And the same question with regard to Plaintiff's Exhibit 22? A. No, sir.

Mr. Rowan: You may take the witness.

Mr. Tugman: No questions.

The Court: That is all then, Mr. Close.

Mr. Rowan: That is all, Mr. Close. You may be excused.

(Witness excused.)

If the Court please, that is all the evidence, and, as stated, it is stipulated that all of the former evidence and this may be considered together as to all exhibits.

The Court: Yes, all right. [161]

Mr. Rowan: I might add, your Honor, my client had called some twenty witnesses and I told him that for the sake of time, there was no use in calling all of them.

I don't know whether I have covered all these exhibits, but I have taken them at random, just the exhibits the Clerk handed to me, which I think illustrates——

The Court: Yes, I think you have covered all the different types, anyway.

Mr. Rowan: That is, the types.

That is all, Mr. Tugman.

The Court: Court will recess for ten minutes.

(Whereupon a short recess was taken.)

Mr. Tugman: If the Court please, there is a gentleman sitting in the back of the room that I have just been talking to who has just been observing. I would like to call him up and ask him what his opinion is.

The Court: Well, all right.

Mr. Rowan: If the Court please, do we need to wait any longer?

The Court: Beg your pardon?

Mr. Rowan: Do we need to wait any longer?

The Court: The witnesses, you mean?

Mr. Rowan: No, Mr. Mounce and myself. Are you going to require we be here?

The Court: This is the same case, he is calling a [162] witness.

Mr. Rowan: I thought he was calling another case.

CLAY P. BUTLER

called and sworn as a witness on behalf of the libelant, was examined and testified as follows:

Direct Examination

By Mr. Tugman:

Q. Will you state your name, please?
A. Clay P. Butler.
Q. What is your occupation, Mr. Butler?
A. I am retired.
Q. What has been your occupation?

(Testimony of Clay P. Butler.)

A. I have been an electrician all my life.

Q. What are you doing here today?

A. Why, I was just visiting here and I have been always interested in the courts so I go and listen.

Q. Why are you interested in courts particularly, Mr. Butler?

A. Well, I have been a bailiff a little term or two and I have been interested in the law and the judges and what makes these things click.

Q. Did you know this hearing was going to be on today? A. No, sir.

Q. I want to show you some magazines here, they are picked at random, Plaintiff's Exhibits 1, 9, 11 and 15, and ask [163] you to look at those and ask you whether or not, in your opinion, those magazines are obscene? A. That is 15, sir?

The Court: Yes.

A. My opinion, in my opinion they are obscene and not fit for general distribution or sale to anybody or any person.

Mr. Tugman: Thank you. No further questions.

Cross-Examination

By Mr. Rowan:

Q. Mr. Butler, have you ever been in an art institute? A. Yes, sir.

Q. Are they obscene?

A. Some of them are.

Q. Have you ever been in the Smithsonian Institute? A. Yes, sir.

(Testimony of Clay P. Butler.)

Q. Do you think there are some parts of that that are obscene?

A. I would so classify them, yes, sir.

Q. Have you ever seen Time magazine or the National Geographic carrying pictures of nude people? A. Yes.

Q. Do you think they are obscene?

A. Some of them, yes, sir.

Q. Mr. Butler, let me ask you this question: Assuming that [164] a race of people who for years practiced nudism except as to the face and covered only the face, nothing else, in public, and assuming that a group of that people, a minority group, advocated the removing of the covering of the face and put out periodicals to show people with the face uncovered, as well as the rest of the body, and you saw those publications, the first time, would you say the picture was obscene as showing the face?

Mr. Tugman: I will object to that, your Honor. There is nothing in the testimony——

The Court: Well, I will overrule the objection. Are you assuming that Mr. Butler is in this imaginative land or is still over here?

Mr. Rowan: He is in the imaginative land of my hypothetical question.

The Court: All right.

A. Well, the standard of those people and the standard of today that we are talking about are quite different.

Q. And what would be the predominant part of that picture or the thing that would attract you if

(Testimony of Clay P. Butler.)

that happened? If you had never seen a face before in public, but had seen all the rest of the body at all times, wouldn't the face stand out as predominant?

A. Probably.

Mr. Rowan: That is all. [165]

The Court: Any other questions, Mr. Tugman?

Mr. Tugman: No other questions.

The Court: That is all, then, Mr. Butler.

Mr. Tugman: Thank you, Mr. Butler.

(Witness excused.)

The Court: Well, that concludes the supplemental evidence, I presume?

Mr. Tugman: That concludes it.

Mr. Rowan: Yes.

The Court: Does counsel wish to argue the case again?

Mr. Rowan: I don't think so, your Honor.

If the Court please, if you will bear with me one minute, I will really not take more than one minute.

I want to emphasize this point that I just asked the question about, and I am serious in it when I say that I believe the former opinion mentions the fact that the pubic area is predominant in some of these, that it predominates over another, and, of course, I have maintained that there can't be anything predominant in any picture except as the individual views that picture as it is reflected.

My point is this: If the American people for thousands of years, hundreds of years, had practiced complete nudism below the face, and if then a minority group of us, we'll say, got together and

said that isn't healthy, we are going to be completely nude, uncover the face of the women as [166] they come in public and put out periodicals, it is only natural that the first thing you would notice would be the face because it is unusual, and I point that out merely for the purpose of showing that if anything predominates, it is because we are not used to seeing it.

A photograph, you can't predominate anything in a photograph. That camera takes an actual picture of everything in it. You can't predominate anything unless you touch the picture up. That is all I have to say, your Honor.

The Court: Well, I think this case was quite thoroughly presented before, and while there was an omission apparently of some of these periodicals in the government's libel, all of these exhibits concerning which there has been testimony today were in evidence in the former main trial and I considered them and had all of them for examination and did examine all of them before I wrote my memorandum opinion.

Now, as I tried to point out in the opinion, this isn't as clear-cut as laymen might suppose. There isn't any hard and fast and fixed definition of obscenity or of what is obscene that can be given because it obviously varies greatly with different times and in different places. Just to use one example that comes to mind, I understand that in Japan even now, and more so in former times, it was the custom for men and women to bathe together in their bath houses in the nude, and I think the same practice is

followed in Finland in their [167] places where they take their steam baths and, of course, those people see nothing at all wrong about completely disrobing and being together with mixed sexes without any clothing, and I think it isn't necessary to call to question the motives or the sincerity or the clean morality of the majority of nudists who follow that cult. I suppose they have all sorts of people, the same as other cults have, but in the main I think they are very sincere people who have become accustomed to that mode of dress or undress and there is nothing that appears to be shocking or indecent or obscene to them in the nude body, but, as I point out here, after all the nudists in this country are a minority group and what I have to apply, I think, is the standard of how these publications would be regarded by the average adult individual in the community, as we say in the negligence cases, the ordinary, prudent, intelligent and mature person, and I think that the testimony of Mr. Butler here could be duplicated almost endlessly by going out and bringing other people in here who are not nudists and who haven't advanced views on the matter of nudity, and I think you would find just a repetition of Mr. Butler's testimony, that to them, the majority, the average person, these publications that I have said are subject to libel are shocking and are regarded as obscene.

So it is really a question of point of view, and if the nudists ever get the majority, why then, of course, [168] their custom and point of view will prevail.

The court will then adhere to its former ruling as set out in the memorandum decision. Have you got a decree prepared?

Mr. Tugman: Yes, I do. If the Court please, I prepared findings of fact and conclusions of law and judgment and served a copy on counsel.

The Court: Yes, all right.

Mr. Rowan: If the Court please, I haven't had time to look at the findings, but I understand I have ten days.

The Court: Yes, to propose amendments under the rules.

The Clerk: Do you want to file the stipulation?

Mr. Tugman: Yes.

Mr. Rowan: See if that is signed.

The Clerk: Yes, it is.

The Court: I notice you have a blank space for a date here on which the Marshal is to destroy the publications.

Mr. Tugman: Yes, I have.

The Court: Of course, you should wait until the time for appeal expires.

Mr. Tugman: Yes. I left it open.

The Court: I just wondered, why do we need it in there at all? I think the Marshal could take his own time, although——

Mr. Rowan: I would suggest, if the Court please, that I think these people are going to take an appeal, I don't know [169] for sure yet, but I think it might be well to preserve them, although I understand they would be so out of date there possibly

would be no damage, but I would hate to consent to the destruction of them.

The Court: I notice in the Sauerkraut decree here, we have got a direction to the Marshal to destroy that. Of course, there hasn't been any appearance and he could destroy it at once, I suppose; but the only thing that I am concerned about, of course, the exhibits would remain here anyway, and they are the ones on which an appeal would be taken. I get Mr. Rowan's point, that if an appeal is taken, by the time an appeal is decided, these particular magazines would be out of date, and if there is a reversal, they would then have the right to bring in similar ones in the future.

Mr. Tugman: I can take that out.

The Court: Wouldn't want to use these, anyway. But if you wish to get a stay during the appeal, I think I should put in about sixty days ahead here. It wouldn't do any harm in putting it far enough ahead so the Mounce people can decide whether they want to appeal, and if they decide whether to take an appeal, decide whether you want to ask for a stay.

Mr. Rowan: That would be fine, your Honor, with us. When does your Honor leave for Alaska?

The Court: On the 8th of January. Well, I will make it the 6th of March. That should be plenty of time. [170]

Reporter's Certificate

United States of America,
Eastern District of Washington—ss.

I, Donald B. Oden, do hereby certify:

That I am the duly appointed, qualified and acting official court reporter of the District Court of the United States of America in and for the Eastern District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings commencing at page 113 through page 159 before the Honorable Sam M. Driver, Judge of the said Court, held on December 30, 1955, at Spokane, Washington. That the above and foregoing contains a full, true and correct transcript of the said proceedings had therein.

Dated this 13th day of February, 1956.

/s/ DONALD B. ODEN,
Official Court Reporter.

[Endorsed]: Filed February 20, 1956. [171]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Stanley D. Taylor, Clerk of the United States District Court for the eastern district of Washington, do hereby certify that the documents annexed hereto are the originals filed in the above-entitled cause:

Title of Document

Libel of Information.
Motion to Dismiss.
Answer.
Stipulation of September 27, 1955.
Reporter's Transcript of Hearing September 27, 1955.
Reporter's Transcript of Additional Hearing December 30, 1955.

Exhibits (Enclosed herewith but not attached hereto)

Plaintiff's

1—International Journal.
2—Die Neue Zeit.
3—Paradies.
4—Paradies.
5—International Journal.
6—Modelstudier.
7—International Journal.
8—Modelstudier.
9—International Journal.
10—International Journal.
11—International Journal.
12—Modelstudier.
13—Modelstudier.
14—Paradies.
15—Modelstudier.
16—Afrodite.
17—Paradies.
18—Sun and Health.

19—Helios.
20—Tidlosa.
21—Paradies.
22—Tidlosa.
23—Licht und Schonheit.
24—Modelstudier.
25—Modelstudier.
26—International Journal.
27—Helios.

Defendant's

28—Sun.
29—Sun.
30—Sunshine & Health.
31—Sunshine & Health.
32—American Nudist Leaders (offered and rejected).
33—Sun & Health (offered and rejected).

Plaintiff's

34—Card index of dealers.
35—Sunshine & Health.
36—Sun.
37—Helios.

Opinion of the Court.
Stipulation of December 30, 1955.
Findings of Fact and Conclusions of Law.
Judgment.
Motion to amend Findings, Conclusions and Judgment.
Order denying Motion to amend Findings, Conclusions and Judgment.
Notice of Appeal.
Notice of Bond.

Clerk's Certificate as to Bond on Appeal.
Statements of Points upon which Appellant will rely.
Motion for Stay.
Order for Stay.
Stipulation to correct Reporter's Record.
Order for correction of Reporter's Record.
Designation of Record.

and that the same constitute the record for hearing of the appeal from the judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as set forth in the Appellant's Designation of Record.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District, this 20th day of March, A.D. 1956.

[Seal] /s/ STANLEY D. TAYLOR,
Clerk, U. S. District Court, Eastern District of Washington.

[Endorsed]: No. 15083. United States Court of Appeals for the Ninth Circuit. Mervin Mounce, Appellant, vs. United States of America, Appellee. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed March 26, 1956.

Docketed: April 2, 1956.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals
for the Ninth Circuit

No. 15083

MERVIN MOUNCE,

Claimant and Appellant,

vs.

UNITED STATES OF AMERICA,

Libelant and Appellee.

ADOPTION OF STATEMENT OF POINTS AND DESIGNATION OF RECORD FILED IN COURT BELOW

Mervin Mounce, Claimant and Appellant in the above-entitled action, hereby adopts the Statement of Points upon which he will rely herein and the Designation of record to be printed as shown in the transcript of record sent up by the Clerk of the lower court and shown at pages 194 and 200, respectively, of the typewritten transcript, as served upon appellee and filed in the court below.

Dated this 29th day of March, 1956.

MERVIN MOUNCE,
Claimant and Appellant;

By /s/ C. C. ROWAN,
His Attorney.

Service of copy acknowledged.

[Endorsed]: Filed April 2, 1956.

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IN THE

Supreme Court of the United States

October Term 1957

No. 542

MERVIN MOUNCE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Borough of Manhattan
City of New York

Of Counsel:
O. JOHN ROGGE
C. C. ROWAN

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
I. The Court of Appeals for the Ninth Circuit in Applying as the Standard of Obscenity in This Case That Which "Offends the Sense of Propriety, Morality, and Decency of the Average Person of" the Community Decided a Federal Question in Conflict With This Court's Decision in Roth v. United States, 354 U. S. 476 (1957)	9
A. Only that is obscene "which deals with sex in a manner appealing to prurient interest." Roth v. United States, 354 U. S. 476, 487 (1957)	9
B. Nudist publications may shock the members of our clothed society but they do not appeal to prurient interest	12
C. The human nude has been with us in art for more than twenty-five centuries and in many other forms more recently	19
D. Our courts have accordingly stated that the human nude is not obscene, and many decisions have held that nudist books, nudist periodicals, nudist films and nude photographs were not obscene	22

PAGE

E. Nudists further urge that it is not nudity but partial clothing that has a tendency to excite lustful thoughts 25

II. The Court of Appeals for the Ninth Circuit, in Adopting the Opinion of the Federal District Court, and Judging the Publications in This Case Rather Than the Conduct and Intent of the Petitioner, Decided a Federal Question in Conflict With This Court's Decision in Roth v. United States, 354 U. S. 476 (1957) 27

III. The Federal Obscenity Statute, 19 U. S. C. §1305(a), 46 STAT. 688, Violates the First and Tenth Amendments in That It Improperly Invades Powers Reserved to the States and to the People 30

CONCLUSION 50

APPENDIX I.

Opinion of the Court of Appeals 51

Judgment of Court of Appeals 53

Order denying petition for rehearing 54

Order staying issuance of mandate 55

APPENDIX II.

Opinion of Federal District Court 56

CITATIONS

PAGE

Cases Cited

Alabama v. Texas, 347 U. S. 272 (1954) 49

American Museum of Natural History v. Keenan, 20 N. J. Super. 111, 89 A. 2d 98 (1952) 23

Capital Enterprises v. Regents, Matter of, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) 23

Commonwealth v. Holmes, 17 Mass. 335 (1821) 31

Commonwealth v. Hueston, The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956) 22, 23, 24

Commonwealth v. Sharpless, 2 S. & R. (Pa.) 91 31

Excelsior Pictures Corp. v. Regents, In the Matter of, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), affirming 2 A. D. 2d 941, 156 N. Y. S. 2d 800 (1956) 23, 24

Kingsley Books v. Brown, 354 U. S. 436 (1957) 27

Knowles v. State, 3 Day (Conn.) 103 (1808) 31

Le Baron v. Olesen, 125 F. Supp. 53 (S. D. Cal. 1954) 23

Maryland State Board v. Times Film Corp., 212 Md. 454, 129 A. 2d 833, 838 (1957) 22, 28

Parmelee v. United States, 113 F. 2d 729 (1940) 15, 21, 22, 25, 29

People v. Gonzales, 107 N. Y. S. 2d 968, 969 (1951) .. 22

People v. Muller, 96 N. Y. 408, 411 (1884) 22

Roth v. United States, 354 U. S. 476 (1957) .. 2, 9, 11, 27, 30, 31, 44, 50

Summerfield v. Sunshine Book Co., 221 F. 2d 42 (D. C. Cir. 1954), cert. denied, 349 U. S. 921 (1955) 6, 23

Sunshine Book Company v. Summerfield, D. D. C. Civil Action No. 3007/53, July 13, 1953 6

Sunshine Book Co. v. Summerfield, 128 F. Supp. 564 (D. D. C. 1955) 6, 22

PAGE

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State v. Lerner, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1948) 23
United States v. California, 332 U. S. 19 (1947) 49
United States v. 4200 Copies International Journal, 134 F. Supp. 490 (1956) 1–2
United States v. Louisiana, 330 U. S. 699 (1950) 49
United States v. Texas, 339 U. S. 707 (1950) 49

Constitutions and Statutes

Act of Feb. 25, 1799, c. 12, §1, 1 Stat. 619 43
Act of Feb. 28, 1803, c. 10, §3, 2 Stat. 206 43
Act of July 10, 1953, c. 185 (67 Stat. 145) 46
First Amendment 3, 9, 31
Tenth Amendment 3
Sedition Act of 1798 ..... 31, 34, 36, 39
Submerged Lands Act, 67 Stat. 29 (1953); 43 U. S. C. §§1301-1315 (Supp. IV, 1956) 49
67 Stat. 18 (1953), 5 U. S. C. §623 (Supp. IV, 1956) 44
19 U.S.C. §1305(a), 46 Stat. 688 ..... 3, 7, 30
28 U.S.C. §1254(1) 2

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1 Annals of Cong. 439 (Gales comp. 1834) 34
1 Annals of Cong. 761 (Gales comp. 1834) 42
Articles of Confederation 1777, Article II 42

PAGE

Cong. Globe, 24th Cong., 1st Sess. 10 38
Cong. Globe, 24th Cong., 1st Sess. 298 (1836) 41
Cong. Globe App., 24th Cong. 1st Sess. 437 (1836) .. 41
12 Cong. Deb. 1737 (1836) 41
99 Cong. Rec. 2459 (1953) 45–46
Connecticut Laws 165 (1821) 31

Delaware Constitution of 1792 33
5 Documentary History of the Constitution 193, 197 (Dept. of State 1905) 36
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Kentucky Resolutions of 1798, 1799 44

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PAGE

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Madison's Report on the Sedition Act of 1798 39
Martinie, Rodin (1947) 21
Maryland Constitution of 1776 33
3 Messages and Papers of the Presidents 147, 176 (Richardson ed. 1896) 38
Massachusetts Bay Acts and Laws 222 (1714) 32
Massachusetts Constitution, Declaration of Rights, Art. XVI (1780) 33

Nina Ridenour, Ph.D., Some Special Problems of Children Age 2 to 5 Years 17
49 Niles' Weekly Register 408, 410 (1836) 43
New Hampshire Constitution, Art. 1, §22 (1784) 33
New Jersey Laws 331-32 (Paterson 1800) 32
New York Times, August 25, 1956, p. 13, col. 1 48
New York Times, August 28, 1956, p. 1, col. 4 48
New York Times, July 14, 1957, p. 48, cols. 4-5 49
New York Times, June 25, 1957, p. 16, cols. 2-8 47
New York Times, July 21, 1957, p. 1, col. 2, p. 40, cols. 3-5 48
New York Times, July 30, 1957, p. 16, col. 6 49
New York Times, September 24, 1957, p. 25, cols. 3-4 49
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Note, 52 Mich. L. Rev. 575, 576 (1954) 31

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Pennsylvania Constitution of 1790 33
2 Pleas of the Crown 130 (Leach ed.) 31
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PAGE

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Rodin (Phaidon (1951) 21

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S. Rep. 118, 24th Cong., 1st Sess. 6 (1836) 43

Time Magazine: March 4, 1946, p. 99; June 11, 1956, p. 85; April 23, 1956, p. 87 20
13 The Papers of Thomas Jefferson 440, 442 (Boyd ed. 1956) 38
10 The Works of Thomas Jefferson 89-90 n. (Fed. ed. by Ford 1905) 37
6 The Writings of James Madison 334 (Hunt ed. 1906) 37

Vermont Constitution of 1777, c. 1, §14 32
Virginia Constitution, Declaration of Rights, §12 (1776) 33
Virginia Resolutions of 1798 37

IN THE

Supreme Court of the United States

October Term 1957

No.

MERVIN MOUNCE,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, appellant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled cause on June 28, 1957.

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit (R. 184-185) is not yet reported. It is reproduced in Appendix I, *infra*, pp. 51-52. The opinion of the United States District Court for the Eastern District of Washington (R. 17-24) is reported *sub nom. United States* v.

4200 Copies International Journal, 134 F. Supp. 490 (1955). It is also reproduced in Appendix II, *infra*, pp. 56-61.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 28, 1957 (R. 186). A duly filed petition for rehearing was denied on September 11, 1957 (R. 187). On September 18, 1957 the Court of Appeals for the Ninth Circuit granted a stay of its mandate pending the consideration and disposition by this Court of a petition for a writ of certiorari, provided such a petition was filed on or before October 14, 1957 (App. I, p. 55). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Is the standard of obscenity which the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal District Court for the Eastern District of Washington, applied in this case, namely, that which "offends the sense of propriety, morality, and decency of" the average person of the community, in conflict with the standard which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476, 487 (1957), namely, that "which deals with sex in a manner appealing to prurient interest"?

2. Did the Court of Appeals for the Ninth Circuit, in judging the publications in this case rather than the conduct of the petitioner, decide a federal question in a way in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957)?

3. Does the federal obscenity statute, 19 U. S. C. §1305(a), 46 Stat. 688, violate the First and Tenth Amendments in that it improperly invades powers reserved to the states and to the people?

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law • • • abridging freedom of speech, or of the press • • •."

2. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

3. 19 U. S. C. §1305(a), 46 Stat. 688.

> "All persons are prohibited from importing into the United States from any foreign country • • • any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral • • •. No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter pro-

vided: * * * *Provided further,* That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.

"Upon the appearance of any such book or matter at any customs office, the same shall be seized and held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

"In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits."

Statement of the Case

Petitioner is a nudist and an advocate of the practice of nudism (R. 44). He has been in the nudist movement for eighteen years (see R. 133). He is a charter member of the Sunway Society, a nonprofit nudist organization incorporated under the laws of the state of Washington, and a past president of the American Sunbathing Association, a national nudist organization (R. 43-44).

Petitioner and other nudists, as well as a number of non-nudists, take the position that the practice of nudism will promote the physical and mental health of human beings. They believe that the practice of nudism will satisfy the healthy curiosity of children and eliminate the unhealthy curiosity of adults about the human body. (R. 45, 47-48, 130-131, 155, 162-165). One non-nudist testified that nudist publications with illustrative pictures would eliminate the peeping Toms in our midst (R. 164).

In order to espouse the cause of nudism and gain new adherents for it, petitioner distributed the nudist publications of various local, national, and international nudist groups (R. 46-48, 50-51, 54, 95, 140). Petitioner in writing advised his different distributors that his interest in selling these various publications was to promote nudism (R. 55). Seventy-one per cent of the converts to nudism came from reading nudist publications (R. 47).

Included among the periodicals which petitioner distributed was Sunshine & Health (R. 48-50, 74). Twenty-five issues of this periodical, from the March 1951 to and including the March 1953 issue, were held by the federal district court for the District of Columbia to be not obscene.

Sunshine Book Company v. *Summerfield*, D. D. C. Civil Action No. 3007/53, July 13, 1953. This decision was affirmed on appeal. *Summerfield* v. *Sunshine Book Co.*, 221 F. 2d 42 (D. C. Cir. 1954), *cert. denied*, 349 U. S. 921 (1955). Subsequently in another proceeding the federal district court for the District of Columbia held the February 1955 issue of Sunshine & Health to be obscene, *Sunshine Book Co.* v. *Summerfield*, 128 F. Supp. 564 (D. D. C. 1955), but this decision was reversed on appeal. *Sunshine Book Co.* v. *Summerfield*, D. C. Cir. No. 12622, May 31, 1956. Thereafter the government petitioned the Court of Appeals for the District of Columbia Circuit for a rehearing *en banc*. This request was granted. Reargument took place on September 25, 1956. Decision on the reargument has not yet been rendered.

Pictures illustrate the text of the nudist publications which the petitioner distributed (R. 52-53). These pictures were taken in nudist camps (R. 76, 87), and were put in these publications for the purpose of advancing nudism (R. 52). They present human beings in accordance with the conceptions of nudists as to the most harmonious relationship between human beings and the earth.

The profit motive was not involved in petitioner's sales of nudist publications. The amount which he made from the sale of foreign nudist publications, estimated at $750. a year, did "not justify the office expense and traveling and so forth to handle them" (R. 89). The bulk of petitioner's income came from property rentals (R. 90, 94-95). He handled nudist publications because he believed in nudism and wanted to promote the nudist movement (R. 95). He would not handle what he called "girlie" magazines (R. 131).

In May 1955 federal customs officials seized two shipments of foreign nudist periodicals, consigned to petitioner, and in July 1955 the district attorney for the Eastern District of Washington filed a libel against them under 19 U. S. C. §1305(a), 46 Stat. 688, on the ground that they were obscene (R. 3-14). Petitioner answered the libel and both sides waived a jury trial (R. 15-17, 40).

The case came on for trial in September 1955 (R. 38). The government rested its case for obscenity solely upon the pictures. It did not contend that any part of the text in any of the publications was obscene. The federal district judge accordingly stated in his opinion that the "character of the printed text in the publications is uniformly unobjectionable", 134 F. Supp. at 494, R. 22, App. II, pp. 59-60, and made a finding to this effect (R. 27).

At the trial two witnesses for the government, not members of any nudist organization, examined some of the photographs in the libeled magazines and testified that in their opinion these publications were obscene (R. 112, 126). Three witnesses for the petitioner, all members of the Sunway Society, two of them women, testified that they were acquainted with the libeled periodicals and that they were not obscene (R. 52, 100, 118). One of the women, in the words of the federal district judge, was "a mother and the other a grandmother" (134 F. Supp. at 493, R. 21, App. II, p. 59). One of these, Mrs. Faith Markell, was a housewife and the mother of six children ranging in ages from 25 down to 14 years (R. 97).

At a subsquent hearing in December 1955 to correct record errors six business men and officials of Spokane, Washington, who were not members of or in any way

connected with any nudist organization, testified that in their opinion the libeled periodicals were not obscene (R. 135-168), while one witness testified for the government that they were (R. 169).

The federal district judge conceded:

> ". . . The libeled books, with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement". 134 F. Supp. at 493, R. 21, App. II, p. 59.

However, he held all of the issues of the various libeled publications, save four, to be "obscene and immoral", ordered them condemned, and directed the federal marshall to destroy them (R. 28, 30, 31). See also 134 F. Supp. at 494, R. 23-24, App. II, p. 494. The judgment of the federal district court was entered on December 30, 1955 (R. 31). Petitioner's motion to amend it was denied on January 19, 1956 (R. 34-35).

The Court of Appeals for the Ninth Circuit affirmed the judgment of the district court in a *per curiam* opinion filed June 28, 1957 (R. 184-185, App. I, pp. 51-52). Its judgment was entered on the same day (R. 186, App. I, p. 53). A petition for rehearing was denied on September 11, 1957 (R. 187). On September 18, 1957 the Court of Appeals for the Ninth Circuit granted a stay of its mandate (App. I, p. 55).

The federal district court in arriving at its conclusion that the libeled publications were "obscene and immoral" applied as the standard of obscenity that which "offends the sense of propriety, morality, and decency of" the average person of the community. 134 F. Supp. at 493,

R. 21, App. II, p. 58. Since, as the court observed, nudists were "very much in the minority" in this country, 134 F. Supp. at 493, R. 21, App. II, p. 59, nudist publications, so the court concluded, were obscene. If nudists should ever become a majority group here then, so the district judge indicated, nudist publications such as those in the instant case would not be obscene (R. 173). The Court of Appeals for the Ninth Circuit adopted the federal district court's opinion (R. 184-185, App. I, pp. 51-52).

Reasons For Granting The Writ

I.

The Court of Appeals for the Ninth Circuit in applying as the standard of obscenity in this case that which "offends the sense of propriety, morality, and decency of" the average person of the community decided a federal question in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

A.

Only That Is Obscene "Which Deals With Sex in a Manner Appealing to Prurient Interest". *Roth* v. *United States*, 353 U. S. 476, 487 (1957).

The exception which this Court created to the First Amendment in *Roth* v. *United States*, 354 U. S. 476 (1957) for obscenity is a very narrow one. Only that material is obscene "which deals with sex in a manner appealing to prurient interest". At 487. In a footnote the Court further defined such material as that "having a tendency to excite lustful thoughts". At 487 n. 20. The Court in its opinion continued: "The portrayal of sex, *e.g.*, in art, literature and

scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press". At 487.

But the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal district court, did not apply this standard. Instead the lower courts applied as the standard of obscenity that which shocked the average person of the community. The federal district judge in his opinion pointed out that nudism was a deviation from the norm in our society. He said:

> " . . . .But nudism is a deviation from the norm at the present time in the United States. Its practitioners are very much in the minority and cannot be said to represent the common viewpoint in this country. The average American, except for works of art or illustrations in medical journals and the like, regards stark nudity, with brazen display of the adult male and female genitalia, as indecent and shocking." 134 F. Supp. at 493, R. 21, App. II, p. 59.

Applying as the standard of obscenity that which was shocking to the average person of the community the court concluded that the nudist publications involved in the instant case were obscene. The district court held:

> " . . . The standard to be applied is the judgment of the average, normal, reasonable, prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute." At 134 F. Supp. at 493, R. 21, App. II, p. 58.

The Court of Appeals for the Ninth Circuit adopted this erroneous standard of obscenity. R. 184-185, App. I, pp. 51-52.

The federal district judge underlined his erroneous approach at the subsequent hearing which took place in this case in December 1955. At that time he commented from the bench:

> "So it is really a question of point of view, and if the nudists ever get the majority, why then, of course, their custom and point of view will prevail." R. 173.

But the standard of obscenity which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), is narrower than that which the lower courts applied, and the reason this Court prescribed a narrow exception for obscenity was that this Court wanted to safeguard to us as full a measure of freedom of utterance as possible. The fact that ideas were hateful or shocking to us would not deny them the protection of the First Amendment. This Court in its opinion in the *Roth* case pointed out:

> "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."
>
> • • •
>
> "All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. • • • " At 484.

After defining the limited nature of the obscenity exception this Court further cautioned:

> "The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth. Ceaseless vigilance is the watchword to prevent their erosion by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. It is therefore vital that the standards for judging obscenity safeguard the protection of freedom of speech and press for material which does not treat sex in a manner appealing to prurient interest." At 488.

Had the lower courts in the instant case applied the prurient interest standard for obscenity they should have come to the conclusion that all of the publications here involved, certainly all of the nudist publications, were not obscene.

B.

Nudist Publications May Shock the Members of Our Clothed Society But They Do Not Appeal to Prurient Interest.

Such testimony as there was on the point was to the effect that the practice of nudism did not appeal to prurient interest. Petitioner testified that the American Sunbathing Association, a national nudist organization, had "no record of any juvenile delinquency in over twenty-five years in nudism in this country". (R. 47-48). There was further testimony of a corroborative nature (R. 101, 119).

The findings of psychologists and social scientists are to the same effect. Dr. Howard C. Warren, founder of the Department of Psychology at Princeton University, an editor of the Encyclopedia of Psychology and of the Psychological Review, made a first-hand study of nudism at home and abroad and found out that disrobing at nudist camps was entirely lacking in sex significance and aroused no more erotic feeling than taking off a cloak or an overcoat at a party. He sets forth the results of his study in an article entitled *Social Nudism and the Body Taboo,* 40 Psychological Rev. 160 (1933). He stated that the practice of nudism within the family served "as an antidote to the harmful sex-curiosity and prurient thoughts which are otherwise inevitable in adolescence." At 166.

Dr. Warren summarized his conclusions in part as follows:

> "The data gathered, supported by findings of earlier writers, led to the following conclusions regarding the psychological effects of social nudism:
>
> 1. On coming into contact with a nudist group, the subjective experience of *shame* and the objective experience of *shock* tend to disappear at once or after a short time, so far as could be observed.
>
> • • •
>
> 3. Where the entire group are unclothed, the sight of the naked body ceases to arouse curiosity. Nudity is accepted as a natural condition. Since there is nothing to focus the attention on any specific part, one has merely the impression of the body as a whole, and sex differentiae no longer possess special significance.
>
> 4. The writer's observations and the testimony of others indicate that social nudity is not produc-

tive of eroticism. There is less sexual excitement, less tendency to flirt, less temptation to ribaldry, in a nudist gathering than in a group or pair of fully clothed young people." At 181-182.

Dr. Warren cited among his authorities Gay, *On Going Naked* 54-56, 163 (1932); F. and M. Merrill, *Among The Nudists* 47 (1931); F. and M. Merrill, *Nudism Comes to America* 299 (1932); Parmelee, *The New Gymnosophy: The Philosophy of Nudity* 303 (1927); Royer, *Let's Go Naked* 192 (transl. fr. French 1932). Gay wrote:

> " . . . but when one mingles all day, day after day, with naked men and women, a penis comes to be not much more unique than an elbow or a knee, and little more remarked; and the contours of one woman seem very much like those of another, save that certain of them are more shapely." At 54.

More recently the columnist Earl Wilson visited a national nudist camp and came to the same conclusions as Dr. Warren. In an article in the March 1950 issue of *Esquire* he reported:

> "My ideas of the skinfolk were considerably altered by this visit.
>
> I heard no iniquitous talk about s-x. . . . But possibly after seeing the other sex nude they found themselves disinterested, because certainly most of these people were unattractive when you saw all of them at once.
>
> Even the dumbest show girls and stripteasers know that, and prove it by keeping on a G-string and at least a rosette. . . .
>
> As I drove away from those acres of epidermis, I felt quite lukewarm about the women there. But

> driving through the near-by town of Mays Landing, I saw a young girl in a skirt and sweater and, do you know something? I whistled." At 116.

Many social scientists support the statements of nudists, and of those who have observed nudists, to the effect that the nude human figure does not appeal to prurient interest or excite lustful thoughts. The Yale political and social scientist, Professor William Graham Sumner in his book *Folkways* 426-446 (1906) gave various instances of nude peoples who were chaste and clothed peoples who were immoral. The Court of Appeals for the District of Columbia Circuit in *Parmelee* v. *United States*, 113 F. 2d 729 (1940) quoted various passages from Sumner's book with approval. At 732-733 n. 16.

Havelock Ellis in 1 *Studies in the Psychology of Sex, The Evaluation of Modesty* (3rd ed. 1910) wrote:

> ". . . . A study of pictures or statuary will alone serve to demonstrate that nakedness is always chaster in its effects than partial clothing. As a well-known artist, Du Maurier, has remarked (in *Trilby*), it is 'a fact well known to all painters and sculptors who have used the nude model (except a few shady pretenders, whose purity, not being of the right sort, has gone rank from too much watching) that nothing is so chaste as nudity. Venus herself, as she drops her garments and steps on the model-throne, leaves behind her on the floor every weapon in her armory by which she can pierce to the grosser passions of men.'" At 61.

The Court in the *Parmelee* case quoted this passage with approval. 113 F. 2d at 732 n. 15.

John Carl Fluegel, a Fellow of the British Sociological Society and former Assistant Professor of Psychology of the University of London, in his book *The Psychology of Clothes* (International Psychoanalytic Library, No. 18, Ernest Jones, M. D., ed. 1950) commented:

> " • • • Indeed if, as is often done, we content ourselves with the simple equation of the immoral with the genitally sexual, these experiments show pretty conclusively that nakedness is a potent method of reducing immorality.
>
> "The real point to bear in mind is that modesty is essentially correlated with desire. Its purpose is to fight desire, but in so doing it rekindles it, so that a circular process is inevitably set in motion. As Anatole France so well says: 'Il est certain que la pudeur communique aux femmes un attrait invincible.'[2] Nature has, in fact, provided that modesty can never finally attain its end except through its own disappearance. • • •
>
> "[2] In the chapter in question (*L'Isle des Pingouins*, book ii, chap. 1) he puts, in his own inimitable way, the whole case that we are here urging." At p. 192.

Fluegel, in his last chapter, entitled *The Future of Dress*, made the further observation that modesty "can interpose no reasonable obstacle to nudity." At 235. Havelock Ellis agrees with him. The latter in his *The Psychology of Sex* (1946), a one-volume condensation of his seven-volume *Studies in the Psychology of Sex*, stated:

> " • • • At no stage of culture does modesty necessarily involve the use of garments. Some savages, who are habitually almost or completely naked, still exhibit modesty, while in modern life new customs

> of complete nakedness—'nudism,' sunbathing, the popular German Nackt-Kultur, etc.—leave modesty intact. . . . . (But how modifiable is modesty may clearly be seen by the increasing number of societies established for the practice of what is termed 'Nudism' whereby men and women in a completely unclothed state are enabled to meet socially without any embarrassment.)" At 36, 337.

Various modern educators support the position of nudists that the nude human body does not appeal to prurient interest. The National Congress of Parents and Teachers recommends adequate sex instruction for infants and children, including seeing the nude human body. Two pamphlets recommended by this organization are *Understanding Ourselves*, and *Your Own Story*. These volumes describe human birth and reproduction with sketches including drawings of the foetus in the womb at the age of two months and again shortly before birth. The pamphlet *Understanding Ourselves* is for children eleven years and up and contains detailed sketches of both male and female reproductive organs with the different parts named and their functions described.

Another pamphlet, entitled *Some Special Problems of Children Age 2 to 5 Years*, planned and written by Nina Ridenour, Ph.D., in collaboration with Isabel Johnson, and published by the National Association for Mental Health, Inc., in association with the New York Committee on Mental Hygiene, contains these paragraphs:

> "Let children of the opposite sex see each other when undressed. However young a child may be—two or three or four—he should be given an explanation when he shows interest or puzzlement over the

sex differences. Tell him in a casual, matter-of-fact tone: boys and men have a penis, girls and women have a vagina.

Answer his questions about babies in a way he can understand. If his natural curiosity is satisfied at each stage of his development, he will be more likely to have a normal healthy attitude towards sex and avoid some of the pitfalls of anxiety and fear and confusion so often associated with the subject." At 57.

A mimeographed outline put out by the New Jersey Congress of Parents and Teachers and based on the family education course of Dr. Mabel Grier Lesher contains this:

"IX. Vocabulary which will help child to understand answers to his questions

1. Pre-school vocabulary for 3 years old—sexual connotation to both sexes.

breast-nipple-abdomen-umbilicus (navel) urine and urinate-faeces (stool)—defecate—anus

Little boy by 3 years should know . . . penis-foreskin scrotum or scrotal sac

Little girl by 3 years should know . . . vulva

2. By 5 years in addition to all words above child should know bladder-urethra-rectum-ovary-ovum-egg-uterus (womb) vagina-labia-genital-pregnant-mating-fertilize

3. Child must have a healthy attitude about his bodily functions—proper vocabulary helps discuss functions in natural manner.

X. Child should have knowledge of body of opposite sex

1. See bodies of parents, brothers and sisters, in a natural way

2. If only child, arrange to have youngster see baby of opposite sex being bathed

3. Learning information as part of a natural experience avoids undue curiosity causing 'Peeping Toms'

4. Knowledge of appearance of bodies of both sexes helps child to grasp quickly the explanation of 'mating', thus relieving parent of undue embarrassment, since many parents find this question difficult to answer." At 3.

The testimony in this case, and such help as the other social sciences have to offer, point to the conclusion that the nude human body does not appeal to prurient interest. It should follow that the nudist publications involved in this case likewise do not appeal to prurient interest.

C.

The Human Nude Has Been With Us in Art for More Than Twenty-five Centuries and in Many Other Forms More Recently.

We have had representations of the human nude, both male and female, separately and together, in sculpture and painting for more than 2500 years. In this history the Greeks took the first steps. They produced monumental statues of naked youths beginning about the middle of the seventh century B.C. Since then we have had so many examples of the human nude in sculpture and painting that they are too numerous to mention. Human nudes in sculpture, painting and other art forms are on exhibition in various museums throughout the country. They have been reproduced in such widely disseminated publications as the *Encyclopaedia Britannica, Time, Life* and in numerous books on art.

The latest edition of the *Encyclopaedia Britannica* (1952) in its articles on *Sculpture* and *Sculpture Technique* contains reproductions of Michelangelo's *Slave*, vol. 20, Plate VII, opp. p. 230, and *Evening*, Plate X, Rodin's *The Kiss*, Plate VII, opp. p. 198, and *The Bronze Age*, Plate X, opp. p. 230, Donatello's *David*, Plate IV, opp. p. 198, Arthur Lee's *Dawn*, Plate XVII, and *Rhythm*, Plate XI, opp. p. 230, and Maillol's *Torso*, Plate XII. In its article on painting this work contains reproductions of Botticelli's *The Birth of Venus*, vol. 17, Plate IV, Correggio's *Mercury Instructing Cupid before Venus*, Plate VIII, Rubens' *Venus and Adonis*, Plate X, and Titian's, *Woman on a Couch*, Plate VIII. The earlier edition of this work in its articles on *Sculpture and Sculpture Technique* carries additionally Michelangelo's *Evening*, vol. 20, Plate V, opp. p. 224, Maillol's *Danae*, Plate XIX, opp. pp. 216-217, and Rodin's *Eternal Springtime*, Plate VIII, opp. 226-227 (14th ed. 1937). This edition on painting also shows one of Matisse's *Odalisques*, vol. 17, Plate XVI.

Life magazine reproduced Michelangelo's *The Creation of Man*, Dec. 26, 1949, pp. 25-48, Botticelli's *The Birth of Venus*, Velazquez's *Lounging Venus*, Correggio's *Awakened Danae*, Manet's *Unblushing Olympia*, Titian's *Bathing Goddess*, Rubens' *Three Graces*, Courbet's *Realistic Bather*, Renoir's nude painting of his wife, and a nude piece of sculpture by Praxiteles, Oct. 22, 1956, pp. 102-111.

Time reproduced a picture of Michelangelo's statue *David*, March 4, 1946, p. 99; Tintoretto's *Minerva Pursuing Venus*, June 11, 1956, p. 85; and Lucus Cranach's *Adam and Eve*, April 23, 1956, p. 87.

Reference may also be made to some of the numerous recent works on art containing reproductions of the human nude. See *e.g.* Kenneth Clark, *The Nude: A Study in Ideal Form* (1953); R. Lulies and M. Hirmer, *Greek Sculpture* (Michael Bullock transl. 1957); O'Malley and Saunders, *Leonardo da Vinci on the Human Body* (1952); Rodin (Phaidon 1951); Goldscheider, *The Sculptures of Michelangelo* (2d ed. 1950); Goldscheider, *The Paintings of Michelangelo* (2d ed. 1948); Martinie, *Rodin* (1947).

More recently representations of nude human figures have occurred in other fields than sculpture and painting. Such representations, of both male and female figures, have come to be used pretty freely in almost any field, and to illustrate almost any text. They are used in etching and photography. They are used in medical treatises and journals. They are used in text books and periodicals. They are used in various works giving sexual instruction and advice.

Almost two decades ago the court in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) thus summarized the situation at that time:

> "Nudity in art has long been recognized as the reverse of obscene. Art galleries, and art catalogues contain many nudes, ancient and modern. Even such a conservative source book as Encyclopaedia Britannica, contains nudes, full front view, male and female, and nude males and females pictured together and in physical contact.
>
> "The use of nude figures and photographs in medical treatises and textbooks is also commonly practiced today. * * *" At 734.

Representations of the human nude have increased still more since the time of that opinion, as the various publications we have cited will attest. Even such a tightly self-censored group as the movie industry, in the December 11, 1956 revision of its Production Code, permitted the filming of nude infants.

D.

Our Courts Have Accordingly Stated That the Human Nude Is Not Obscene; and Many Decisions Have Held That Nudist Books, Nudist Periodicals, Nudist Films and Nude Photographs Were Not Obscene.

Because of our long history with the human nude in various art forms, and more recently in numerous other forms, our courts have frequently stated that nudity per se is not obscene. See *e.g. Parmelee* v. *United States,* 113 F. 2d 729, 732 (D. C. Cir. 1940); *Maryland State Board* v. *Times Film Corp.,* 212 Md. 454, 129 A. 2d 833, 838 (1957); *People* v. *Muller,* 96 N. Y. 408, 411 (1884); *People* v. *Gonzales,* 107 N. Y. S. 2d 968, 969 (1951); *Sunshine Book Company* v. *Summerfield,* 128 F. Supp. 564, 569 (D. D. C. 1955), *reversed on other grounds,* C. A. D. C. No. 12622, May 31, 1956; *Commonwealth* v. *Hueston,* The Legal Intelligencer, Oct. 26, 1956, 25 U. S. Law Week 2193, 2194 (1956). Indeed, the district court in the instant case said so. 134 F. Supp. at 493, R. 20, App. II, p. 58.

Accordingly many cases have held that nudist books, nudist periodicals, nudist films and nude photographs were not obscene. See *e.g. Parmelee* v. *United States,* 113 F. 2d 729 (D. C. Cir. 1940) (Parmelee's book, *Nudism in Modern Life*); *Sunshine Book Company* v. *Summerfield,*

D. D. C. Civil Action No. 3007/53, July 13, 1953, *affirmed*, 221 F. 2d 43 (1954), *cert. denied*, 349 U. S. 921 (1955) (numerous issues of the nudist periodicals *Sunshine & Health* and *Sun Magazine*); *State* v. *Lerner*, 51 Oh. L. Abs. 321, 81 N. E. 2d 282 (1948) (seven issues of the nudist periodical *Sunshine & Health*); *Le Baron* v. *Olesen*, 125 F. Supp. 53 (S. D. Cal. 1954) (Marilyn Monroe coasters); *In the Matter of Excelsior Pictures Corp.* v. *Regents*, 3 N. Y. 2d 237, 144 N. E. 2d 31 (1957), *affirming* 2 A. D. 2d 941, 156 N. Y. S. 2d 800 (1956) (nudist film *Garden of Eden*); *Matter of Capital Enterprises* v. *Regents*, 1 A. D. 2d 990, 149 N. Y. S. 2d 920 (1956) (motion picture *Mom and Dad*, depicting human birth); *Maryland State Board* v. *Times Film Corp.*, 212 Md. 454, 129 A. 2d 833 (1957) (film *Naked Amazon*, showing Camayura Indians in the jungles of Brazil, who live entirely unclothed); *American Museum of Natural History* v. *Keenan*, 20 N. J. Super. 111, 89 A. 2d 98 (1952) (film *Latuko*, which depicts the life of a nude African tribe); *Commonwealth* v. *Hueston*, The Legal Intelligencer, Oct. 26, 1956, 26 U. S. Law Week 2193 (photographs of the human nude).

In the Matter of Excelsior Pictures Corp. v. *Regents*, *supra*, Judge Desmond described the motion picture there involved, *Garden of Eden*, as "a fictionalized depiction of the activities of the members of a nudist group in a secluded private camp in Florida". 3 N. Y. 2d at 239, 144 N. E. 2d at 32. He further stated that in the film "the nudists are shown as wholesome, happy people in family groups practicing their sincere if misguided theory that clothing, when climate does not require it, is deleterious to mental health by promoting an attitude of shame with

regard to natural attributes and functions of the body' ". *Ibid.*. In holding the film to be not obscene he reasoned:

> "The pictured episodes are 'honestly relevant to the adequate expression of innocent ideas' (United States v. Kennerly, D. C., 209 F. 119, 120-121) just as are figures of nude men and women in the decor of public buildings including New York court houses, and in the pages of *National Geographic Magazine* and in ultra-respectable travel pictures." 3 N. Y. 2d at 239-240, 144 N. E. 2d at 32-33.

In *Commonwealth* v. *Hueston, supra,* involving nude photographs, the court reasoned:

> "On June 11, 1956 at page 85 of Time magazine, the editor published under the heading of 'Master of the Renaissance' a full color reproduction of Tintoretto's 'Minerva Pursuing Venus'. On April 23, 1956, the same publication carried Lucas Cranach's 'Adam and Eve' at page 87. Both Tintoretto's 'Venus' and Cranach's 'Adam and Eve' were, as were the women photographed in our exhibits, depicted in the nude, but certainly no one would call their work indecedent or obscene.
>
> "Are the exhibits in this case to be condemned because they fail to measure up to the artistic standards of a Renoir, Tintoretto or Cranach? I think not".

The nudist film *Garden of Eden,* according to the Court of Appeals of New York, "has been shown in 36 States and in many foreign countries". *In the Matter of Excelsior Pictures Corp.* v. *Regents,* 3 N. Y. 2d 237, 239, 144 N. E. 2d 31, 32 (1957).

These numerous holdings support petitioner's position that the nudist publications in the instant case in espousing the cause of nudism do not appeal to prurient interest.

E.

Nudists Further Urge That It Is Not Nudity But Partial Clothing That Has a Tendency to Excite Lustful Thoughts.

According to the nudists it is not nudity but partial clothing that excites lustful thoughts. It is the striptease, as its very name implies, it is the art of a Gypsy Rose Lee, the plunging neckline of a Faye Emerson, the sarong of a Dorothy Lamour, the sweaters on sweater girls and bikini bathing suits, and not nudism or nudist publications, that appeal to prurient interest (see R. 121). Again social scientists come to the support of the nudist position. Havelook Ellis in 1 *Studies In The Psychology of Sex* explains:

> "If the conquest of sexual desire were the first and last consideration of life, it would be more reasonable to prohibit clothing than to prohibit nakedness." At 197.

Robert Burton in his *Anatomy of Melancholy* (Dell and Jordan-Smith ed. 1951), after dealing at length with the allurements of love, concludes:

> "When you have all done, the greatest provocations of lust are from our apparel; * * * ". At 687.

Burton is quoted with approval by the court in *Parmelee v. United States*, 113 F. 2d 729, 732 n. 15 (D. C. Cir 1940).

Fluegel in his *Psychology of Clothes* (International Psychoanalytical library, No. 18, Dr. Ernst Jones, ed. 1950), makes the point that clothing originated not for reasons of protection or modesty, but in order to call attention to sex, in other words, in order to appeal to prurient interest. At 16-17, 26, 201. He states "that clothes not only serve to arouse sexual interest but may themselves actually symbolize the sexual organs". At 26. He further tells us that if we are opposed to the abolition of all unnecessary sex distinctions in costume, "let us be honest, and frankly admit that we are not in earnest about the undesirability of sexual stimulation, and that on the contrary we cannot bear to face the prospect of abolishing the present system of constant titillation". At 201.

But the Court of Appeals for the Ninth Circuit, adopting the opinion of the federal district judge, erroneously applied as the standard of obscenity that which is shocking to the average member of the community of our clothed society. Had it applied the correct standard, namely, that which appeals to prurient interest and has a tendency to excite lustful thoughts, it would have come to the conclusion that the publications involved in the instant case, certainly all the nudist publications, were not obscene.

II.

The Court of Appeals for the Ninth Circuit, in adopting the opinion of the Federal District Court, and judging the publications in this case rather than the conduct and intent of the petitioner, decided a federal question in conflict with this Court's decision in *Roth* v. *United States*, 354 U. S. 476 (1957).

Although the federal district judge in the instant case conceded that the publications here involved "with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement" (134 F. Supp. at 493, R. 21, App. II, p. 59), he nevertheless proceeded to judge the publications and gave no weight to the conduct and intent of the petitioner. The Court of Appeals for the Ninth Circuit adopted his opinion (R. 184-185, App. I, pp. 51-52).

But as Mr. Chief Justice Warren pointed out in his concurring opinion in *Roth* v. *United States*, 354 U. S. 476 (1957) the conduct and intent of the petitioner have an important relevance. Chief Justice Warren stated:

> "• • • It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture. The nature of the materials is, of course, relevant as an attribute of the defendant's conduct, but the materials are thus placed in context from which they draw color and character. A wholly different result might be reached in a different setting." At 495.

Or as Mr. Chief Justice Warren observed in his dissenting opinion in *Kingsley Books* v. *Brown*, 354 U. S. 436 (1957):

> "• • • this New York law places the book on trial. There is totally lacking any standard in the statute for judging the book in context. The personal element basic to the criminal laws is entirely absent. In my judgment, the same object may have wholly different impact depending upon the setting in which it is placed. Under this statute, the setting is irrelevant.
>
> "It is the manner of use that should determine obscenity. It is the conduct of the individual that should be judged, not the quality of art or literature. • • •" At 445-446.

Or as the Court of Appeals for the District of Columbia Circuit observed in *Sunshine Book Company* v. *Summerfield*, No. 12622, May 31, 1956:

> "• • • Furthermore, neither the Department nor the District Court appears to have investigated or considered the intent of the publisher, one of the important elements in obscenity cases. Parmelee v. United States, supra, 72 App. D. C. at 209, 113 F. 2d at 735; United States v. One Book Entitled Ulysses, supra, 72 F. 2d at 707, 708. 'Honest, sincere' works must be distinguished from publications 'wholly for the purpose of profitably pandering to the lewd and lascivious.' Parmelee v. United States, supra, 72 App. D. C. at 209, 210, 113 F. 2d at 735, 736." At 3-4.

Had the federal district court considered the conduct and intent of petitioner the result which it would have reached should have been different. The petitioner distributed the publications involved in the instant case in order to promote the cause of nudism (R. 46-48, 50-55, 95, 140). Although the distribution of the publications in question was

not limited to nudists, the intent of the petitioner in distributing them to those who were not nudists was for the purpose of gaining new supporters for the practice of nudism. After all, 71 per cent of the converts to nudism came from reading nudist publications (R. 47). In distributing these publications the profit motive was not the petitioner's guiding influence (R. 89-90, 94-95). As the petitioner testified, he had other ways of making a living (R. 95). He further indicated that he would not distribute material which appealed to prurient interest. He testified:

> "Well, we call them 'girlie' magazines. They are devoted to sex and exorbitant disp'ay and emphasis of secondary sex characteristics, wit: women in outlandish positions, and suggestive jokes. We would not handle that type of material at all." R. 131.

Moreover, the pictures in the publications in the instant case were taken in nudist camps and were put in these publications for the purpose of illustrating the text and advancing the cause of nudism (R. 52-53, 76, 87). Nudists feel that in order to present their ideas intelligently and effectively they need pictures to illustrate the text and show the healthy enjoyment that people derive from being out of doors in the nude. In the present state of development of the graphic arts, and in these days of pictorial newspapers, magazines and books, the force of this argument should readily be conceded. Indeed, in *Parmelee* v. *United States*, 113 F. 2d 729 (D. C. Cir. 1940) the Court quoted with approval this portion of the preface of Parmelee's book *Nudism in Modern Life*:

> "The illustrations depict better than words can describe the natural and normal life, and the beautiful and healthful methods and activities of a gymno-

> sophic society. They portray them as actually applied in several European countries by many thousands of men, women and children of all classes, occupations and conditions, while the text discusses its scientific, hygienic, cultural, aesthetic, ethical and humanitarian significance." At 737.

Had the federal district judge and the Court of Appeals for the Ninth Circuit taken into consideration the conduct and intent of the petitioner, his belief in nudism and his desire to advance it, his distribution of the publications in question in order to gain new converts to nudism, the absence of a dominating profit motive, and the use of the pictures in these publications to make more effective the presentation of the ideas of nudists, the scales should have been tipped in favor of the legality of these publications.

III.

The Federal Obscenity Statute, 19 U. S. C. §1305(a), 46 Stat. 688, violates the First and Tenth Amendments in that it improperly invades powers reserved to the States and to the People.

In *Roth* v. *United States*, 354 U. S. 476 (1957) the Court, in holding constitutional a federal obscenity statute relating to the use of the mails, took this as its starting point: "The guarantees of freedom of expression in effect in 10 of the 14 States which by 1792 had ratified the Constitution, gave no absolute protection for every utterance. Thirteen of the 14 States provided for the prosecution of libel, and all of those States made either blasphemy or profanity, or both, statutory crimes." At 482.

But the difficulty with the Court's stand is that the framers of the First Amendment, as their opposition to the Sedition Act of 1798 emphasized, intended the states to have certain powers over speech which they expressly sought to deny to the federal government. Specifically they took the position that the states and not the federal government had jurisdiction over the offense of seditious libel. They would have taken the same position with reference to the offenses of blasphemy and profanity, and, later still, obscenity—the first reported decision in this country sustaining a conviction for obscenity did not occur until 1815,[1] more than a quarter of a century after

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[1] *Commonwealth* v. *Sharpless*, 2 S. & R. (Pa.) 91. As late as 1795 an edition of Hawkins read: "And it seems, that a writing full of obscene ribaldry, without any kind of reflection upon any one, is not punishable at all by any prosecution at common law, as I have heard agreed in the court of king's bench . . ." 2 PLEAS OF THE CROWN 130 (Leach ed.). See also *Roth* v. *United States*, 354 U. S. 476, 514 (1957) (dissenting opinion of Mr. Justice Douglas); GELLHORN, INDIVIDUAL FREEDOM AND GOVERNMENTAL RESTRAINTS 99 (1956); Alpert, *Judicial Censorship of Obscene Literature*, 52 HARV. L. REV. 40, 47 (1938); Grant and Angoff, *Massachusetts and Censorship*, 10 B. U. L. REV. 36, 52 (1930); Lockhart and McClure, *Literature, the Law of Obscenity and the Constitution*, 38 MINN. L. REV. 295, 324 n. 200 1954); Note, 52 MICH. L. REV. 575, 576 (1954).

Likewise the first state legislation on the subject did not begin to appear until 1821. Stat. Laws of Conn. 165 (1821).

But the Court in the *Roth* case stated: "At the time of the adoption of the First Amendment, obscenity law was not as fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity too, was outside the protection intended for speech and press." 354 U. S. at 483. In support of this statement the Court cited the *Sharpless* case and *Knowles* v. *State*, 3 Day (Conn.) 103 (1808), and *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821), as well as the statute of Connecticut of 1821 and one of New Jersey of 1798, among others. Knowles was charged with exhibiting an indecent and unseemly picture "representing a horrid and unnatural *monster*", but on appeal his conviction was reversed. Also, the New Jersey statute to which the Court referred is not in point. It prohibited

the first Congress proposed the first Ten Amendments. A consideration of the intent of the founders of this country with reference to state power over speech will underscore the fact that they intended the federal government to have no power in this area.

First however, however, some qualifying observations about the Court's statement are in order. The ten states to which the majority opinion refers are Delaware, Georgia, Maryland, Massachusetts, New Hampshire, North Carolina, Pennsylvania, South Carolina, Vermont and Virginia. These reduce to nine as of the date when the first Congress proposed the first Ten Amendments (September 25, 1789); for the cited constitution of one of them, Delaware, dated from 1792. 354 U. S. at 482 n. 10. In the second place the state constitutional provisions were not always in as sweeping terms as the First Amendment. For example, the Vermont constitution of 1786 expressly identified freedom of speech and of the press with discussions of "the transactions of government." C. I, §15.[2] In the third place these state constitutional provisions at times

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stage performances but did not deal with obscenity. Laws of New Jersey 331-32 (Paterson 1800). It would thus seem that the Court's statement is somewhat too broad.

However, an act of 1711 of the colony of Massachusetts Bay made it an offense to write, print or publish "any Filthy Obscene or Prophane Song, Pamphlet, Libel or Mock-Sermon, in Imitation or in Mimicking of Preaching, or any other part of Divine Worship. . . ." Acts and Laws of Mass. Bay 222 (1714). On the basis of this act the Court concluded: "Thus, profanity and obscenity were related offenses." 353 U. S. at 483. One will have to concede the validity of this conclusion. The attitude which excluded blasphemy from free speech guarantees would deal similarly with obscenity when that offense developed.

[2] The Court referred to the declaration of rights in the Vermont constitution of 1777, c. 1, §14, which did not contain this restricting identification.

contained exceptions. The Pennsylvania constitution of 1790 and the Delaware constitution of 1792 had exceptions for seditious libel, that of South Carolina of 1790 for licentiousness, and that of Maryland of 1776 for immorality. The Pennsylvania constitution of 1790 provided that in seditious libel prosecutions truth was to be a defense and "the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases." Art. IX, §7.[3] The Delaware Constitution of 1792 contained a similar provision. Art. I, §5. The South Carolina constitution of 1790 in providing for religious freedom expressly stated: "That the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Art. VIII, §1. The Maryland declaration of rights of 1776 had this exception: ". . . unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality . . ." Art. XXXIII.[4] By way of contrast the First Amendment provided without qualification: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."

In the fourth place the states did not always observe their own constitutional provisions. As Madison pointed out when he submitted his proposed amendments to the

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[3] Again, in the case of Pennsylvania, the Court referred to the declaration of rights in an earlier constitution, that of 1776, art. 12, which again was more broadly drawn.

[4] Of the remaining five there were two whose constitutions provided that freedom of the press was to remain inviolate. GA. CONST. art. LXI (1777), art. IV, §3 (1789); N. H. CONST. art. 1, §22 (1784). The remaining three provided that the liberty of the press was not to be restrained. MASS. CONST., Declaration of Rights, art. XVI (1780); N. C. CONST. Declaration of Rights, art. XV (1776); VA. CONST., Declaration of Rights, §12 (1776).

first Congress in June 1789: " . . . there are a few particular States in which some of the most valuable articles have not, at one time or other, been violated . . . ". 1 ANNALS OF CONG. 439 (Gales, comp. 1834).

However, the main difficulty with the Court's action in sustaining the validity of a federal obscenity statute lies in the fact that the framers of the First Amendment intended that whatever governmental power existed over utterances was to reside in the states rather than the federal government. The proceedings of the First Congress on the first Ten Amendments show this; the opposition to the Sedition Act of 1798 stresses it; and the defeat of President Jackson's proposal for barring "incendiary publications" from the mails reaffirms the point.

One of Madison's proposed amendments provided: "No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases." *Id.* at 435. This proposed amendment came from Madison alone. No state convention asked for it. In offering it he explained: " . . . it is proper that every Government should be disarmed of powers which trench upon those particular rights. I know, in some of the State constitutions, the power of the Government is controlled by such a declaration; but others are not. I cannot see any reason against obtaining even a double security on those points; and nothing can give a more sincere proof of the attachment of those who oppose this constitution to these great and important rights than to see them join in obtaining the security I have now proposed; because it must be admitted, on all hands, that the State Governments are as liable to attack these invaluable privileges as the Gen-

eral Government is, and therefore ought to be as cautiously guarded against." *Id.* at 441.

The House sent Madison's proposals to a special committee of which he was one of the members. The special committee revised this proposal to read: "No State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases." See *id.* at 755.

Representative Thomas Tucker of South Carolina objected to it: "This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alterations of the constitutions of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words."

But: "Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people." *Id.* at 755.

Madison won out in the House. After a further minor revision this proposal went to the Senate in this form: "No State shall infringe the right of trial by jury in criminal cases, nor the rights of conscience, nor the free-

dom of speech, or of the press." 5 DOCUMENTARY HISTORY OF THE CONSTITUTION 193, 197 (Dept. of State 1905). But in the Senate the position which Tucker took in the House won out, and this proposal was rejected.

The national debate on the Sedition Act of 1798 underlined the point that the states had a certain amount of power over utterances which was denied the federal government. In the debates in Congress Nicholas of Virginia, Nathaniel Macon of North Carolina and Edward Livingston of New York all drew a distinction between state and federal power. Nicholas: " . . . He had heard it said that all the States take cognizance of offenses of this sort. But does that give the power to the General Government? Because the States declare certain things offenses, have the General Government power over the like offenses? If so, it would have a concurrent power with all the State Governments which, he believed, would be a novel idea. Indeed, he was utterly at a loss to find any ground upon which to found a law of this kind. He was confident there was none." ANNALS OF CONG. 2142, 5th Cong. 2d Sess. (1798).

Macon: " . . . He thought this subject of the liberty of the press was sacred, and ought to be left where the Constitution had left it. The States have complete power on the subject, and when Congress legislates, it ought to have confidence in the States, as the States ought also to have confidence in Congress, or our Government is gone. . . ." *Id.* at 2152.

Livingston: " . . . Every man's character is protected by law, and every man who shall publish a libel on any part of the Government, is liable to punishment. Not,

said Mr. L., by laws which we ourselves have made, but by laws passed by the several States. And is not this most proper? . . ." *Id.* at 2153.

Madison took the same position in his *Address* and subsequent *Report* on the Virginia Resolutions of 1798. In his *Address* he stated: ". . . But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts . . ." 6 THE WRITINGS OF JAMES MADISON 334 (Hunt ed. 1906); 4 ELLIOT, DEBATES 530 (2d ed. 1881). In his *Report* he added that libelled federal officials had to seek redress "under the same laws, and in the same tribunals, which protect their lives, their liberties, and their properties." 6 *id.* (Madison) at 393; 4 *id.* (Elliot) at 573.

A few months before his second inauguration Jefferson wrote to Mrs. John (Abigail) Adams, the wife of his political opponent in the presidential campaign of 1800: ". . . Nor does the opinion of the unconstitutionality, and consequent nullity of that law [Sedition Act of 1798] remove all restraint from the overwhelming torrent of slander, which is confounding all vice and virtue, all truth and falsehood, in the U. S. The power to do that is fully possessed by the several State Legislatures. It was reserved to them, & denied to the General Government, by the Constitution, according to our construction of it. While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the States, and their exclusive right, to do so." Letter of Sept. 11, 1804. 10 THE WORKS OF THOMAS JEFFERSON 89-90 n. (Fed. ed. by Ford 1905). A decade and a half earlier he had written Madison from Paris: ". . . A declaration that

the federal government will never restrain the presses from printing any thing they please, will not take away the liability of the printers for false facts printed . . .": 13 THE PAPERS OF THOMAS JEFFERSON 440, 442 (Boyd ed. 1956).

In his second inaugural Jefferson took occasion to restate his position: "During this course of administration and in order to disturb it, the artillery of the press has been levelled against us, charged with whatsoever its licentiousness could devise or dare. These abuses of an institution so important to freedom and science, are deeply to be regretted, inasmuch as they tend to lessen its usefulness, and to sap its safety; they might, indeed, have been corrected by the wholesome punishments reserved and provided by the laws of the several States against falsehood and defamation; but public duties more urgent press on the time of public servants, and the offenders have therefore been left to find their punishment in the public indignation." 10 WORKS at 133-34.

In December 1835 President Andrew Jackson proposed to Congress the passage of a law which would prohibit the use of the mails for "incendiary publications intended to instigate the slaves to insurrection." CONG. GLOBE, 24th Cong., 1st Sess. 10. See also 3 MESSAGES AND PAPERS OF THE PRESIDENTS 147, 176 (Richardson ed. 1896).

The Senate referred President Jackson's proposal to a Special Committee with John C. Calhoun of South Carolina as Chairman and two Southern and two Northern members—the Senate Committee on the Post Office and Post Roads had but one Southern member. The Special Committee, despite its majority of Southern members, despite

the vehemence of Northern anti-slavery agitation and the dissemination from the North of a volume of abolitionist literature throughout the South, and despite Calhoun's bitter antagonism to abolitionist literature and his intense desire for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering, reported adversely on President Jackson's proposal on the ground that the First Amendment forbade any such measure. In support of its conclusions the Committee cited Madison's *Report* on the Sedition Act of 1798. The Committee stated:

> ". . . while they agree * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it, they have not been able to assent to the measure of redress which he recommends.
>
> "After the most careful and deliberate investigation they have been constrained to adopt the conclusion that Congress has not the power to pass such a law . . .
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads, or from the trust 'of preserving the relation created by the constitution between the States,' as supposed by the President. However ingenious or plausible the arguments may be to derive the right from these, or any other sources, they must fall short of their object. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the constitution which, among other things,

provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *."

"That it was the object of this provision to place the freedom of the press beyond the possible interference of Congress, is a doctrine not now advanced for the first time. It is the ground taken, and so ably sustained by Mr. Madison, in his celebrated report to the Virginia Legislature, in 1799, against the alien and sedition law, and which conclusively settled the principle that Congress has no right, in any form, or in any manner, to interfere with the freedom of the press. The establishment of this principle not only overthrew the sedition act, but was the cause of the great political revolution which, in 1801, brought the republican party, with Mr. Jefferson at its head, into power. * * *

"* * * Nothing is more clear than that the admission of the right, on the part of Congress, to determining what papers are incendiary and as such to prohibit their circulation through the mail, necessarily involves the right to determine what are not incendiary, and to enforce their circulation. . . . It would give Congress, without regard to the prohibition laws of the States, the authority to open the gates to the flood of incendiary publications which are ready to break into those States, and to punish all who dare resist as criminals. Fortunately, Congress has no such right. . . ." S. REP. 118, 24th Cong. 1st Sess. 1-5 (1836). The report is also set out in 49 *Niles' Weekly Register* 408 (1836).

However, Calhoun as chairman prepared a bill which in its first section, as amended, made it unlawful "for any

deputy postmaster, in any State, Territory, or District of the United States, knowingly to deliver to any person whatever, any pamphlet, newspaper, handbill, or other printed matter or pictorial representation touching the subject of slavery, where, by the laws of the said State, Territory, or District, their circulation is prohibited; and any deputy postmaster who shall be guilty thereof, shall be forthwith removed from office." CONG. GLOBE APP., 24th Cong. 1st Sess. 437 (1836). The Calhoun bill was likewise defeated: the vote against it was 25 to 19. *Id.* at 442; 12 CONG. DEB. 1737 (1836).

Senator Henry Clay of Kentucky considered this bill "unconstitutional; and if not so, that it contained a principle of a most dangerous and alarming character * * * after much reflection he had come to the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * * the States alone had the power, and their power was ample for the purpose. The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief. * * * " Id. at 439.[5]

There is an additional consideration: the framers of the First Amendment, in order to make doubly certain that the federal government did not have or exercise any powers other than those which the Constitution either expressly or by implication delegated to it, provided in the Tenth Amendment: "The powers not delegated to the United

[5] During the course of the debates Calhoun pointed out that "if they once acknowledged the power of Congress to suppress the transmission of these incendiary papers directly, and to say what was incendiary, it would be conceding to it to decide what was not incendiary, as they were in their nature correlative rights. . . ." CONG. GLOBE, 24th Cong., 1st Sess. 298 (1836).

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Madison had originally proposed: "The powers not delegated by this Constitution, nor prohibited by it to the States, are reserved to the States respectively." 1 ANNALS OF CONG. 436 (1789) (Gales comp. 1834). As revised this became the Tenth Amendment. An effort was twice made, once by Tucker (*Id.* at 761), and again by Gerry (*Id.* at 767), to carry the idea embodied in this amendment still further by inserting the word "expressly" before the word "delegated". This was the way it had been in the Articles of Confederation.[6] Madison opposed Tucker's proposal "because it was impossible to confine a Government to the exercise of express powers; there must necessarily be admitted powers by implication, unless the Constitution descended to recount every minutiae." 1 ANNALS OF CONG. 761 (189) (Gales comp. 1834). Madison's view prevailed. However in the area covered by the First Amendment the Tenth Amendment meant that whatever power there was over utterances, as such, resided, not in the federal government, but in the states or in the people.

The contrast between the exercise of federal power today over the morals of the citizens of this country with that of an earlier day is striking. Federal legislation when our country was new placed much greater reliance on state governments. For example, an act of 1799 directed federal coastal officials duly to observe "the quarantines and other

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[6] Article II of the Articles of Confederation 1777 provided: "Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled."

restraints, which shall be required and established by the health laws of any state" with respect to any incoming vessels and "faithfully to aid in the execution of such quarantines and health laws." Act of Feb. 25, 1799, c. 12, §1, 1 STAT. 619. Or again, an act of 1803 told customs officers "to notice and be governed by the provisions of the laws of the several states prohibiting the admission or importation of any negro, mulatto, or other person of colour." Act of Feb. 28, 1803, c. 10, §3, 2 STAT. 206. The Special Committee which reported adversely on President Jackson's proposal for barring the use of the mails to "incendiary publications" cited these acts to show the respect which Congress had been wont to give to state laws. S. REP. 118, 24th Cong., 1st Sess. 6 (1836); 49 *Niles' Weekly Register* 408, 410 (1836).

Furthermore, once it has been determined that federal power exists in a certain area then another threat arises to state governments, and that is the doctrine of preemption. Indeed in *Alberts* v. *California*, 354 U. S. 476 (1957), the California obscenity case at the 1956 term of this Court, counsel for petitioner, relying on federal obscenity legislation, argued: "The scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it." Brief for Appellant, p. 115 (subheading). The Court rejected the argument in that case, 354 U. S. at 493-494, but once federal power is established in the obscenity field Congress then has the power to pre-empt this field if it wishes to do so. One can ask with a certain amount of apprehension whether Congress will then add to the recently established Department of Health, Education and Welfare (67 STAT.

18 (1953), 5 U. S. C. 623 (Supp. IV, 1956)) yet another, a Department of Culture!

When one adds to *Roth* v. *United States*, 354 U. S. 476 (1957), the doctrine of pre-emption we are indeed in danger of becoming the "general and consolidated government" [4 ELLIOT, DEBATES 542 (2d ed. 1881)] of which Jefferson in the Kentucky Resolutions of 1798, and the "general consolidated government" [4 ELLIOT, DEBATES 545 (2d ed. 1881)] of which the draftsman of the Kentucky Resolutions of 1799, expressed their fears. It was this problem which Mr. Justice Harlan had in mind when he wrote in his dissent in the *Roth* case:

> "Not only is the federal interest in protecting the Nation against pornography attenuated, but the dangers of federal censorship in this field are far greater than anything the States may do. It has often been said that one of the great strengths of our federal system is that we have, in forty-eight States, forty-eight experimental social laboratories. State statutory law reflects predominantly this capacity of a legislature to introduce novel techniques of social control. The federal system has the immense advantage of providing forty-eight separate centers for such experimentation. Different States will have different attitudes towards the same work of literature. The same book which is freely read in one State might be classed as obscene in another. And it seems to me that no overwhelming danger to our freedom to experiment and to gratify our tastes in literature is likely to result from the suppression of a borderline book in one of the States, so long as there is no uniform nation-wide suppression of the book, and so long as other States are free to experiment with the same or bolder books.

"Quite a different situation is presented, however, where the Federal Government imposes the ban. The danger is perhaps not great if the people of one State, through their legislature, decide that 'Lady Chatterley's Lover' goes so far beyond the acceptable standards of candor that it will be deemed offensive and non-sellable, for the State next door is still free to make its own choice. At least we do not have one uniform standard. But the dangers to free thought and expression are truly great if the Federal Government imposes a blanket ban over the Nation on such a book. The prerogative of the States to differ on their ideas of morality will be destroyed, the ability of States to experiment will be stunted. The fact that the people of one State cannot read some of the works of D. H. Lawrence seems to me, if not wise or desirable, at least acceptable. But that no person in the United States should be allowed to do so seems to me to be intolerable, and violative of both of the letter and spirit of the First Amendment.

"I judge this case, then, in view of what I think is the attenuated federal interest in this field, in view of the very real danger of a deadening uniformity which can result from nation-wide federal censorship, and in view of the fact that the constitutionality of this conviction must be weighted against the First and not the Fourteenth Amendment. . . ." 354 U. S. at 505-507.

It has been to this problem that President Eisenhower has repeatedly given his attention during his two terms as our chief executive. In a message to Congress in March 1953 he recommended "the creation of a commission to study the means of achieving a sounder relationship between Federal, State, and local governments" 99 Cong.

REC. 2459 (1953). Congress accordingly established a Commission on Intergovernmental Relations (Act of July 10, 1953, c. 185 (67 STAT. 145) "to study the proper role of the Federal Government in relation to the States and their political subdivisions . . . to the end that these relations may be clearly defined and the functions concerned may be allocated to their proper jurisdiction." *Id.*, §1.

The next month he told the 45th annual Conference of Governors, meeting in Seattle, that he had "asked for a commission that would study this proper division between state responsibility and Federal responsibility." For the text of his address see N. Y. Times, Aug. 5, 1953, p. 10, cols. 3-8.

The Commission on Intergovernmental Relations, with Meyer Kestnbaum as its chairman, submitted reports totalling over 2000 pages. The index alone ran to almost 150 pages. In *A Report to the President for Transmittal to the Congress* it mustered the admonition: ". . . Assuming efficient and responsible government at all levels—National, State, and local—we should seek to divide our civic responsibilities so that we:

> "*Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate, and for the continuing responsibilities that only the National Government can undertake.*" At 6 (1955).

President Eisenhower made the problem the subject of his address at Williamsburg, Virginia at a state dinner of the 49th annual Conference of State Governors. He cautioned that those who "would stay free must stand eternal watch against excessive concentration of power in government." For the text of his address see N. Y. Times, June 25, 1957, p. 16, cols. 2-8. He pointed to the concentration of power in the hands of the communists in Russia, and observed, with reference to recent efforts there at decentralization, that even "Soviet rulers have felt compelled to allow some small part of the Government to gravitate closer to the people." He referred by way of contrast to our governmental system of checks and balances, but continued: "Yet a distinguished American scholar has only recently counseled us that in the measurable future, if present trends continue, the states are sure to degenerate into powerless satellites of the National Government in Washington."

He stated the substance of the Tenth Amendment. With reference to a governor who wired Washington for help instead of asking the state legislature to act, he commented:

> "But does it not tend to encourage the still greater growth of the distant and impersonal centralized bureaucracy that Jefferson held in such dread and warned us about in such great and intense detail?"

He proposed the formation of a joint federal-state committee charged with these duties:

> "One — To designate functions which the states are ready and willing to assume and finance that are now performed or financed wholly or in part by the Federal Government;

"Two — To recommend the Federal and State revenue adjustments required to enable the states to assume such functions; and

"Three — To identify functions and responsibilities likely to require state or Federal attention in the future and to recommend the level of state effort, or Federal effort, or both, that will be needed to assure effective action."

Such a study group has since been created. It is known as the Joint Federal-State Action Committee, and consists of seven federal officials, including three Cabinet officers, and ten state governors. N. Y. Times, July 21, 1957, p. 1, col. 2, p. 40, cols. 3-5.

The concentration of power in the hands of the federal government was also a topic for discussion at the 1956 and 1957 annual meetings of the American Bar Association and of the Conference of Chief Justices. In August 1956 at the 79th annual meeting of the American Bar Association the dominant note in the welcoming speech of Governor Allan Shivers of Texas and in the address of the association's then president, E. Smythe Gambrell, was that federal concentration of power threatened to destroy states' rights. Governor Shivers welcomed the members of the association "to a state whose people believe in the Tenth Amendment." Mr. Gambrell declared that in the "clamor of controversy" over the first eight amendments to the Constitution "our people seem to have overlooked the Ninth and Tenth Amendments." N. Y. Times, Aug. 28, 1956, p. 1, col. 4. In the same month the speakers at the Conference of Chief Justices, composed of the highest judicial officers of the 48 states, took up the same theme.

N. Y. Times Aug. 25, 1956, p. 13, col. 1. The latter body at its 1957 meeting authorized a special committee to study the role of the judiciary as it affected the distribution of power between the federal and state governments. N. Y. Times, July 14, 1957, p. 48, cols. 4-5.

In addition to the president, the Conference of State Governors, the Conference of Chief Justices, and the American Bar Association, a Government Operations subcommittee of the House of Representatives in July 1957 gave attention to the continuing growth of federal power. It held a hearing. One of its witnesses was Meyer Kestnbaum. He said that the study to be conducted by the Joint Federal-State Action Committee as well as a series of regional meetings which the subcommittee planned to hold after Congress adjourned could do a great deal to focus attention on the problem. N. Y. Times, July 30, 1957, p. 16, col. 6.

In September 1957 the National Conference of Chief Justices set up two special committees to study means of slowing the "constant expansion" of federal governmental power. One of these was to study the judiciary's role in the expansion of federal power at the expense of the states. N. Y. Times, Sept. 24, 1957, p. 25, cols. 3-4.

So far little has been accomplished. Nevertheless, on one issue the states prevailed: the ownership of tidelands oil. However, they did not win their victory before the Supreme Court [(see *United States* v. *Texas*, 339 U. S. 707 (1950); *United States* v. *Louisiana*, 330 U. S. 699 (1950); *United States* v. *California*, 332 U. S. 19 (1947)]; but in Congress [(Submerged Lands Act, 67 STAT. 29 (1953); 43 U. S. C. §§1301-1315 (Supp. IV, 1956); *Alabama* v. *Texas*, 347 U. S.

272 (1954)]. This but bears out the observation of the Commission on Intergovernmental Relations in its *Report to the President* that the Court, although the guardian of civil liberties (at 29-30), in comparison with, and contrast to, the other two branches of government, over the past century and a half "except when dealing with slavery, has probably taken the most consistently Nationalist position." *Id.* at 23.

State power can prevail in one other area, obscenity, if the Court will but apply the First Amendment in the manner in which it is submitted its framers intended. Obscenity is such a purely local matter that only local communities should decide what to do about it.

CONCLUSION

Since the Court of Appeals for the Ninth Circuit applied a standard of obscenity in the instant case which conflicts with the standard which this Court prescribed in *Roth* v. *United States*, 354 U. S. 476 (1957), this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,083—June 28, 1957

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

Before:

DENMAN, Chief Judge and POPE and CHAMBERS, Circuit Judges.

Per Curiam:

We are in agreement with Judge Driver's opinion that the standard to be applied in determining whether or not publications are obscene within the meaning of Paragraph 1305(a) of Title 19 U. S. C. "is the judgment of the average, normal, reasonable, prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person,

it is within the bar of the statute. Otherwise it is not . . . Guided by these general principles . . . the trier of facts must draw the line as best he can between art and pornography—between what is permissible and what is not."

We find no error in the trial court's findings of fact, based upon its application of this standard to the facts established by the record in this case. We adopt Judge Driver's opinion as the opinion of the Court — F. Supp. —

The constitutional questions which appellant has raised in this court and which were not discussed in the opinion of the district court have been foreclosed by the decision of the Supreme Court in Roth v. United States, No. 582, decided June 24, 1957.

The judgment is affirmed.

(Endorsed:) Per Curiam Opinion. Filed June 28, 1957.

PAUL P. O'BRIEN,
Clerk

Appendix I

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15083

MERVIN MOUNCE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

JUDGMENT

Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(Endorsed) Judgment
Filed and entered: June 28, 1957
PAUL P. O'BRIEN, Clerk.

Appendix I

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

Excerpt from Proceedings of Wednesday, September 11, 1957

Before:

Denman, Pope and Chambers,
Circuit Judges

Order Denying Petition for Rehearing

On consideration thereof, and by direction of the Court, It is Ordered that the petition of Appellant, filed July 27, 1957, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15083

MERVIN MOUNCE,

vs.

UNITED STATES OF AMERICA

ORDER STAYING ISSUANCE OF MANDATE

Upon application of C. C. Rowan, Esq. counsel for the Petitioner, and good cause therefor appearing, IT IS ORDERED that the issuance, under Rule 26 of the mandate of this Court in the above cause be, and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Petitioner herein, providing such petition is filed in the clerk's office of the Supreme Court of the United States on or before October 14, 1957. In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

WILLIAM DENMAN
United States Circuit Judge.

(Endorsed) Sep. 18 1957
Filed
Paul P. O'Brien,
Clerk
September 18, 1957

DATED: SAN FRANCISCO, CALIF.

Appendix II

United States v. *4200 Copies International Journal*, 134 F. Supp. 490 (D. C. E. D. Oct. 5, 1955).

William B. Bantz, U. S. Atty., William M. Tugman, Asst. U. S. Atty., Spokane, Wash. for libelant.

C. C. Rowan, Spokane, Wash., for claimant.

DRIVER, Chief Judge.

This is a libel action brought by the United States against a large number of imported publications. The basic question presented is, whether such publications are obscene and, as such, subject to forfeiture, confiscation and destruction under the provisions of Section 1305 of Title 19, U. S. C. A. That section, in part, provides that all persons are prohibited from importing into the United States "any obscene book, pamphlet, paper, writing, * * * print, picture, * * *." It authorizes seizure of prohibited publications by the collector of customs and outlines the procedure for their condemnation in the United States District Court. The section further provides that, "No such articles, whether imported separately or contained in packages with other goods entitled to entry, shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * *."

Attached to the libel of information in this case as Exhibits A, B, and C, are three reports of seizure by the

United States Customs Service. Exhibit A shows that on May 3, 1955, two cases of paper bound books were seized, consisting of 300 volumes of Helios and 500 volumes of Tidlosa. The report does not indicate whether the two publications were mixed in the two cases, or all the Helios was in one case and all the Tidlosa in the other. Exhibit B shows seizure on May 11, 1955, of one case of paper bound books containing 4200 copies of International Journal, and 500 copies of Afrodite. Exhibit C shows seizure on May 11, 1955, of one case of paper bound books containing 2000 copies of Sun & Health, 1500 copies of Helios, 700 copies of Modelstudier, 200 copies of Paradise, and 100 copies of Licht & Sconheit [sic]. It thus appears that there were 300 volumes of Helios in the seizure Exhibit A, and 1500 copies of the same publication in seizure Exhibit C, but what particular books or periodical issues were in each of the seizures does not clearly appear. Moreover, the "cases" mentioned in the customs reports do not appear to have been kept intact. The United States Marshal's return which is in the file, sets forth a straight listing of the publications taken over by him, with the number of copies of each, without any mention of cases or packages. In this situation it seems impracticable for me to attempt to apply the provision of the statute concerning condemnation of the entire contents of a package if it is found to contain one or more obscene items. I shall, therefore, separately pass upon each publication involved as plaintiff's (libelant's)[1] Exhibits 1-27, inclusive.

[1] For convenience in the trial, the libelant was called the plaintiff and the claimant the defendant. The same designations will be applied in this opinion.

Appendix II

Plaintiff contends that the publications are obscene by reason of the photographs of nude men and women with which they are illustrated. The word "obscene" is not capable of exact definition for the reason that its meaning depends upon prevailing mores at different times and in different places.[2] However, in what may be termed the modern cases, the courts are fairly well agreed upon the general principles which should govern in the application of the statute under consideration and comparable enactments which forbid transmission through the United States mails of obscene publications.[3]

Nudity is not per se obscene. It may properly be employed in works of art and medical and scientific treatises. A publication is not to be judged by one or two isolated illustrations or passages but is to be regarded as a whole. An effort should be made to ascertain and evaluate the dominant effect, and such dominant effect or tone determines its entire character. The effect upon children or upon persons of extraordinary susceptibility to evil influences is not decisive. The standard to be applied is the judgment of the average, normal, reasonable prudent person of the community in which the publication is circulated. If, at the time of such circulation, considered as a whole it of-

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[2] See *United States* v. *Kennerley*, D. C. 209 F. 119, 121. Judge Learned Hand, the author of the opinion therein, put the following query: "If there be no abstract definition, such as I have suggested, should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which the community may have arrived here and now?"

[3] See for example, *United States* v. *One Book Entitled Ulysses*, 2 Cir., 72 F. 2d 705; *Parmelee* v. *United States*, 72 App. D. C. 203, 113 F. 2d 729; *Burstein* v. *United States*, 9 Cir., 178 F. 2d 665; and *Sunshine Book Co.* v. *Summerfield*, D. C., 128 F. Supp. 564.

fends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute. Otherwise it is not. Guided by these general principles, and without having available any definite yardstick that can be applied, the trier of facts must draw the line as best he can between art and pornography—between what is permissible and what is objectionable and obscene.

The difficulty in the present case, I think, arises principally from a difference of viewpoint. The libeled books, with one exception, are nudist publications designed to portray nudist practices and to secure new converts to the movement. Adherents of the cult conscientiously do not regard as objectionable the full display in mixed company of nude male and female bodies. But nudism is a deviation from the norm at the present time in the United States. Its practitioners are very much in the minority and cannot be said to represent the common viewpoint in this country. The average American, except for works of art or illustrations in medical journals and the like, regards stark nudity, with brazen display of the adult male and female genitalia, as indecent and shocking. This difference of viewpoint was brought out by the testimony of the witnesses in the trial. The defendant called two women, obviously quite respectable—one a mother and the other a grandmother, both members of a nudist organization—who testified that they saw nothing objectionable in the publications in evidence. On the other hand, two other respectable housewives, who appeared to be representative of the average person of the community, examined the same publications and found them to be indecent and obscene.

Appendix II

It is my conclusion that, with some exceptions to which I shall call attention later on, the publications in evidence have the dominant effect and purpose of showing not only without restraint, but with emphasis on normally private areas, the nude figures of both men and women and that, to the average adult person, they are obscene with the meaning of the statute. In reaching that conclusion I have taken many factors into consideration. The character of the printed text in the publications is uniformly unobjectionable, although much of it is in a foreign language and therefore not intelligible to most persons in this country. I have taken into account the relationship of the pictures to the printed articles, the size of the nude figures in the pictures, the relative number of full front and side or back views, and the extent to which the genitals and pubic areas have been covered or minimized by position, posture, distance from the camera, use of light and shade, et cetera.

The libeled books were imported for commercial purposes and were to be sold at a profit through the usual channels of distribution, principally on news stands throughout the country. They were not, therefore, to be limited to members of the nudist cults, and must be judged by their effect upon the general public. In this connection, it is interesting to note that of the twenty-seven publications introduced in evidence as exhibits for the plaintiff, twenty have on the front cover prominently displayed nude pictures, of well-developed, shapely young women. One would be naive, indeed, not to appreciate the commercial value of displaying such front-cover material on the news stands. Although an avowed purpose of the books is to explain the nudist movement, its principles and its prac-

tices, there are relatively very few photographs of the mixed groups of all ages which ordinarily would be found in the nudist park. The great preponderance of the illustrations depicts shapely, well-developed young women appearing in the nude, mostly in front exposures.

The issues of Modelstudier which are in evidence, I think, are clearly within the prohibition of the statute. The publication does not even appear to have any connection with the nudist movement. As the name implies, ostensibly it supplies models for the use of art students.[4] Some of the numbers contain no printed matter at all, and in others the text is wholly, or in large part, in a foreign language. They contain many large closeup, full front-view photographs of nude men and women, plainly showing the genital and pubic areas.

Without going into further detail, I find all of the publications, plaintiff's Exhibits 1-27, inclusive, obscene and subject to condemnation and destruction, with the following exceptions: Plaintiff's Exhibit 2, DeNeue Zeit, is not mentioned at all in the report of seizure of the customs service, but the Marshal's return lists one hundred copies. It cannot be condemned without a record showing that it was a part of the seizure made by the customs service under the statute. I am of the view that, plaintiff's Exhibit 3, Paradies, and plaintiff's Exhibit 4, Paradies, and plaintiff's Exhibit 16, Afrodite, are not obscene. In these publications some of the figures are clothed, and there is a much larger

[4] The following statement appears in plaintiff's Exhibit 15, Modelstudier NR41: "This publication is primarily planned for artists and draughtsmen who desire to better their model drawing."

proportion of side and rear views. There are some shadow silhouettes, and for the most part, the critical areas are concealed, shaded, or minimized by posture or lighting. Also, even to one who claims no expert knowledge in the field there appears to be a good-faith striving for artistic values in the posing and treatment of the subjects in some of the photographs. While they contain a few illustrations which I should regard as objectionable if considered by themselves, I cannot say that, taken as a whole, the dominant effect or tone of the publication is obscene within the meaning of the statute.

Findings in accordance with the views herein expressed may be presented.

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No. 542

In the Supreme Court of the United States

OCTOBER TERM, 1957

MERVIN MOUNCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Discussion	6
Conclusion	8

CITATIONS

Cases:

Roth v. *United States*, 354 U.S. 476	2, 6, 7, 8
Sunshine Book Company v. *Summerfield*, decided October 3, 1957 (C.A.D.C.)	8

Statute:

19 U.S.C. 1305(a), 46 Stat. 688	2, 3

In the Supreme Court of the United States

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No. 542

MERVIN MOUNCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals (R. 184-185) is reported at 247 F. 2d 148. The opinion of the District Court, *sub nom. United States* v. *4200 Copies International Journal,* is reported at 134 F. Supp. 490.

JURISDICTION

The judgment of the Court of Appeals was entered on June 28, 1957 (R. 186). A petition for rehearing was denied on September 11, 1957 (R. 187). The petition for a writ of certiorari was filed on October 11, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the standard applied by the district judge and adopted by the Court of Appeals to determine whether the libeled magazines were obscene comports with the standard laid down by this Court in *Roth* v. *United States*, 354 U.S. 476.

STATUTE INVOLVED

19 U.S.C. 1305(a), 46 Stat. 688, reads in pertinent part:

> All persons are prohibited from importing into the United States from any foreign country * * * any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing, or other representation, figure, or image on or of paper or other material, or any cast, instrument, or other article which is obscene or immoral, * * *. No such articles whether imported separately or contained in packages with other goods entitled to entry shall be admitted to entry; and all such articles and, unless it appears to the satisfaction of the collector that the obscene or other prohibited articles contained in the package were inclosed therein without the knowledge or consent of the importer, owner, agent, or consignee, the entire contents of the package in which such articles are contained, shall be subject to seizure and forfeiture as hereinafter provided: * * *: *Provided further*, That the Secretary of the Treasury may, in his discretion, admit the so-called classics or books of recognized and established literary or scientific merit, but may, in his discretion, admit such classics or books only when imported for noncommercial purposes.
>
> Upon the appearance of any such book or matter at any customs office, the same shall be seized and

held by the collector to await the judgment of the district court as hereinafter provided; and no protest shall be taken to the United States Customs Court from the decision of the collector. Upon the seizure of such book or matter the collector shall transmit information thereof to the district attorney of the district in which is situated the office at which such seizure has taken place, who shall institute proceedings in the district court for the forfeiture, confiscation, and destruction of the book or matter seized. Upon the adjudication that such book or matter thus seized is of the character the entry of which is by this section prohibited, it shall be ordered destroyed and shall be destroyed. Upon adjudication that such book or matter thus seized is not of the character the entry of which is by this section prohibited, it shall not be excluded from entry under the provisions of this section.

In any such proceeding any party in interest may upon demand have the facts at issue determined by a jury and any party may have an appeal or the right of review as in the case of ordinary actions or suits.

STATEMENT

Pursuant to 19 U.S.C. 1305(a), *supra*, pp. 2-3, the United States Attorney for the Eastern District of Washington on July 22, 1955, instituted a libel against over 9,000 magazines, imported from Sweden and Denmark and consigned to petitioner, consisting largely of photographs of nudes. The libel requested forfeiture and destruction of these magazines on the ground that the pictures and photographs contained therein "* * * will so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic,

scientific or other merits they may have in other persons' hands" (R. 6, 3-7). Petitioner answered, denying, *inter alia*, that the pictures and photographs were obscene and requested that the libel be dismissed (R. 15-17).

Pursuant to stipuation, the case was tried without a jury (R. 40). After trial, the judge found that the libeled publications were imported for commercial purposes; that despite the unobjectionable character of the text—most of which was in a foreign langauge—the pictures and photographs dominated the publications; and that these pictures and photographs were obscene (134 F. Supp. 490; R. 18-24).[1] In a *per curiam* opinion, the Court of Appeals for the Ninth Circuit unanimously affirmed (Pet. App. I, 51-52).

The pertinent evidence may be summarized as follows:

Petitioner, a member of the American Sun Bathing Association (a nudist group), headed a local of that association in Spokane, Washington. He testified that he imported magazines of the character libeled for distribution in the United States in connection with the nudist movement (R. 42-55). The pattern of his operation was to purchase these magazines from various overseas concerns, and to distribute them—about 45,000 a year—to various dealers located throughout the

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[1] The publications found obscene were: 1,920 copies of *International Journal*, nos. 5-7, 11-14; 2,346 copies of *Modelstudier*, nos. 3, 8, 11-13, 15, 41; 301 copies of Paradies, nos. 42, 52, 53; 2,000 copies of *Sun and Health*, no. 26; 1,499 copies of *Helios*, no. 23, and 299 bound copies of *Helios*, nos. 1-12 (1953); 593 copies of *Tidlosa*, issues of December 1954 and January 1955; and 99 copies of *Licht Und Schonheit* (R. 29-31).

United States for purposes of resale (R. 53-54, 59-60, 88-89). According to petitioner, the American nudist movement had about 10,000 members (R. 43). He alleged that his profits from such sales amounted to about $750 per year, and were used "to buy more magazines" (R. 59, 95). He testified further that he had written to the various dealers retailing the magazines that his interest in selling them was to promote nudism, and that he did not approve of their sale to minors without parental approval (R. 55). On cross-examination, he admitted that these magazines could be purchased by any bona fide news agency, and that "[t]hey do what they like with them" (R. 82-83).

Agent Brandt of the Customs Service testified that petitioner advised him that he had placed no restrictions on the retailing of the magazines by the dealers (R. 109). Agent Bauman stated that he had seen one of the magazines that petitioner distributed (*Helios*) in a store in "the skid road of Seattle", and had purchased it with no questions asked (R. 103-105). Such text as there was in these publications was primarily in a foreign language. Thus, the bound copies of *Helios* (1953 edition) were printed entirely in Danish (R. 66-67); *Paradies,* nos. 42, 52 and 53, entirely in German (R. 67); *Tidlosa* in Swedish (R. 68-69); and *Licht Und Schonheit* entirely in German (R. 68, 70). Some of the copies of *Modelstudier* were made up completely of nude photographs without any text at all (R. 63).[2]

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[2] *Modelstudier* no. 41 contained the following statement: "This publication is primarily planned for artists and draughtsmen who desire to better their model drawing" (134 F. Supp. at 494, n. 4; R. 23).

Neither petitioner, nor any of the members of nudist organizations whom he called on the trial, could read the foreign language text contained in these magazines (R. 62, 99, 102, 122).

DISCUSSION

If the courts below had clearly applied as the test of obscenity the standard adopted by this Court in *Roth* v. *United States*, 354 U.S. 476, we would not believe that it would be appropriate for this Court to review the application of that test to the particular magazines here involved. Judgment must be involved in every determination of obscenity and this Court cannot re-examine each case.

However, it is at least doubtful that the courts below applied the correct test. This Court stated in *Roth* at pages 487 and 489:

> * * * Obscene material is material which deals with sex in a manner appealing to prurient interest. * * *
>
> * * * whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest. * * *

But the trial court in this case stated in its opinion (R. 21):

> * * * If, at the time of such circulation, considered as a whole it offends the sense of propriety, morality, and decency of such average person, it is within the bar of the statute. Otherwise it is not. * * *

We believe that this is a materially different test from that established by this Court since it depends upon offense to higher-level feelings rather than the affirmative promotion of baser ones.

The district court's findings of fact come closer to this Court's standard. Finding 4 is as follows (R. 26-27):

> 4. Plaintiff's Exhibits. * * * are obscene and immoral in that the pictures and photographs contained in said publications would so much arouse the salacity of persons into whose hands they are liable to fall as to outweigh any artistic, scientific or other merits they may have in other person's hands.

The difficulty is that the court of appeals, in affirming the judgment of the trial court, quoted with approval the standard expressed in the opinion of the trial court rather than that implied in its factual findings. In our view, therefore, it may well have affirmed on the basis of an improper test of obscenity.[3]

In view of the apparent contradiction in standards between the opinion and the findings of the trial court and the fact that the court below may well have affirmed on the basis of a test which we believe to have been incorrect, we submit that it would be appropriate for this Court to grant the petition for a writ of certiorari

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[3] The opinion of the district court was released on October 5, 1955, and the findings on December 30, 1955, well before *Roth*. The *Roth* decision was announced on June 24, 1957. The opinion of the Court of Appeals was filed on June 28, 1957. That opinion makes reference to the decision in *Roth* with respect to the constitutional issue but not with respect to the the standard of obscenity.

and remand the case to the trial court for reconsideration in the light of the standards approved by this Court in *Roth*.[4]

CONCLUSION

For the foregoing reasons, the United States does not oppose the grant of the petition for certiorari in this case but submits that the judgment of the court of appeals should be vacated and the case remanded to the district court for further consideration in the light of the *Roth* opinion.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

NOVEMBER, 1957.

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[4] In *Sunshine Book Company* v. *Summerfield*, decided October 3, 1957, the Court of Appeals for the District of Columbia Circuit, with three judges dissenting, upheld the dismissal of a complaint for an injunction to obtain mailing privileges for a nudist magazine. The Postmaster General and the District Court found that the pictures in the magazine were obscene. The subject matter of the magazines is similar to that here involved. A petition for a writ of certiorari, No. 587, has recently been filed.

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